Supreme Court, U.S.
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DOCKET NO : _____

IN THE
SUPREME COURT
OF THE
UNITED STATES

LESLIE PERKINS,
Petitioner,
Vs.

UNITED STATES OF AMERICA
Respondent

ON PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Leslie Perkins (57160-004)
Petitioner, Pro Se
FCC Coleman Camp
PO Box 1027
Coleman, FL 33521-1027

QUESTIONS PRESENTED FOR REVIEW

1. Has Petitioner shown "cause and prejudice" to excuse her procedural default, and can this court grant the writ in the absence of showing when Petitioner has shown a fundamental miscarriage of justice?

2. Does the Due Process Clause and Doctrine of Stare Decisis tolerate convictions for conduct that was never criminal?

3. When a defendant has no expectation of privacy on telephone calls within the Bureau of Prisons, does that mean she is without constitutional protection? Has the so-called "express consent" exception voided the rights of an incarcerated defendant.

4. Can recordings in "furtherance of the conspiracy" be given a sufficient indicia of reliability and accuracy to be admissible at trial when much of the contents contained false information making contents inherently untrustworthy? Is there a violation of confrontation values even though the statements in issue were admitted under recognized hearsay exception?

LIST OF PARTIES TO PROCEEDING

COMES NOW the Petitioner Leslie Perkins and lists these parties to the proceedings before this Court:

The Honorable William P. Dimitrouleas
(Trial Judge)

The Honorabale Paul C. Huck
(Habeas Judge)

Michael D. Gelety (Attorney)

AUSA Anne Schultz

Solicitor General of the United States

AUSA Julia Vaglienti

Leslie Perkins - Petitioner

The Appellant, Leslie Perkins, pursuant to Federal Rule of Appellate Procedure 26.1 hereby discloses that she is an individual and is not a corporate entity.

LESLIE PERKINS, PETITIONER
FCC COLEMAN CAMP, PO BOX 1027
COLEMAN, FL 33521-1027

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CITATION OF THE LOWER COURTS OPINIONS AND PRELIMINARY STATEMENT

On April 28, 2005, a federal grand jury in the Southern District of Florida returned an indictment charging Petitioner and her husband, Joel Perkins, with conspiracy to import five kilograms or more of cocaine into the United States, in violation of 21 U.S.C. 952(A) 963 (Count I); conspiracy to possess with intent to distribute five kilograms or more of cocaine, in violation of 21 U.S.C. 846 (Count II); and possession with intent to distribute 500 grams or more or cocaine, in violation of 21 U.S.C. 841 (Count III (CR-DE 27). Marvin Johnson was not arrested or charged.

Co-defendant Joel Perkins pled guilty to Count I pursuant to a plea agreement with the United States, given DAP eligibility, no firearm

enhancement, and has since been released from incarceration (CR-DE 56). After a jury trial, Petitioner was convicted of Counts I and II and acquitted of Count III; the jury made a specific finding that she had conspired to import and to possess at least 15 kilograms, but less than 50 kilograms of cocaine (CR-DE 76). The Court denied Petitioner's motion for judgment of acquittal at the close of the government case (CR-DE 131, p. 112), as well as her post-trial and pro se renewed motions for judgment of acquittal (CR-DE 85, 86), and for a new trial (CR-DE 84, 87, 99).

The Court sentenced Petitioner to two terms of 210 months of imprisonment, including the firearm enhancement, U.S.S.G. 2D.1 (b) (1), running concurrently with one another, to be followed by concurrent five-year terms of supervised release, and a special assessment of $200.00 (CR-DE 98).

Petitioner appealed (CR-DE 103). On October 26, 2006, the Eleventh Circuit Court of Appeals affirmed Petitioner's conviction and sentence in an unpublished decision (CR-DE 139, p. 3-21). On February 20, 2007, the Supreme Court denied certiorari review. Perkins v. United States, ___ U.S.., 127 S.Ct. 1344 (2007).

On April 18, 2007, Petitioner filed 2255 motion (CV-DE 1). On June 12, 2007 the district court denied motion to vacate. On July 31, 2007 the district court denied motion for reconsideration and certificate of appealability. The Petitioner, on November 8, 2007, appealed district courts denial and was denied certificate of appealability for the Eleventh Circuit Court of Appeals and the same court denied motion for reconsideration on December 27, 2007.

STATEMENT OF JURISDICTION

Pursuant to Supreme Court Rule 22(b) and 28 USCS 1254 the Petitioner Perkins states:

The opinion subject of review was entered on December 27 2007 with the Supreme Court **extending timely filing to 60 days from 04/03/08.**

This court has jurisdiction to review on certiorari the refusal of habeas relief in the District Court and Court of Appeals.

Petitioner has served appropriate numbers of complete copies of this Petition to the Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Ave, N. W., Washington, D. C. 20530-0001, as well as to the United States Attorney's Office for the Southern District of Florida, 99 N. E. 4th Street, Fifth Floor, Miami, FL 33132-2111

STATEMENT OF THE CASE

In early 2005, DEA Agent Randy Matschner received information regarding an informant named "Brian" (DE 129, p. 32, 38), and began an investigation of Joel Perkins. (DE 129, p. 38 & 39), posing in his undercover role as a friend of "Brian" who was a mate on a fifty-four foot power boat named "Reel Time." (DE 129, p. 37, 41 & 42).

After more phone calls between the agent and Joel, the two met on February 14, 2005, and discussed importation of cocaine and bringing a third party to the U.S. on the boat. (DE 129 p. 44, 49, 50, 60). This meeting was recorded as Government's Exhibit 1.

There was a second meeting February 22, 2005, and the men again discussed importing cocaine and bringing one of the Bahamians back (DE 129, p. 64 – 65, 66 – 7). This meeting was recorded as

Government's Exhibit 2. On February 28, 2005, the men again met, but this time, the Petitioner was present (DE 129, p. 70: DE 130, p. 16). Again this meeting was recorded (Exhibit 3) and again no drugs were possessed or displayed, in fact, Petitioner plainly said that the Bahamian would like to come here and importing drugs was not the intended goal. Matschner and Joel met again on March 1, 2005 (DE 130, p. 32), and Joel again spoke of the Bahamian coming on the boat to the US, and mentioned "big guys in the Bahamas." (DE 130, p. 35). NOTE: Joel, a white male was still pretending that the Petitioner, a black female, was not his wife, but instead, was associated with the Bahamians.

On March 3, 2005, the agent and Joel again met in a recorded meeting (Exhibit 5) (DE 130, p. 39, 47), and at their meeting, 3/5/05, Joel offered Matschner forty-five hundred dollars ($4500.00) in

cash to allow a passenger to come back to the U. S. on the undercover boat (DE 30, p. 53, 56, 59). Matschner suggested that the Petitioner could come out on the Bahamian boat and then come back to the United States on the undercover boat (DE 130, p. 65). This meeting was also recorded, Exhibit 7. Later that day (3/5/05) there was a three-way phone conversation in which the Petitioner agreed to the Agent's plan. (DE 130, p. 69). This meeting was not recorded.

Sunday, 3/6/05, the "Reel Time" left Fort Lauderdale, traveled to Bahamian waters, and met a Boston Whaler boat (DE 130, p. 77 & 78), with two black male Bahamians and the Petitioner, and both males seemed to have hidden pistols in their belts, covered by jackets (DE 130, p. 80: DE 131, p. 21) NOTE: No guns were ever recovered and the Petitioner Perkins and no guns on her person or in

her purse; in later jail-house recordings, Marvin Johnson adamantly denied having a gun.

The small boat approached the "Reel Time," Petitioner was helped onto the boat, and Marvin Johnson handed Matschner a cooler, indicating that there was "dope" inside. (DE 130, p. 80, 81 & 82). Marvin Johnson tried to sneak onto the boat and was pushed overboard. (DE 130, p. 82), and Petitioner was arrested and searched with nothing found. (DE 130, p. 82; DE 131, p. 22). The cooler was searched and it contained absolutely no drugs, just packages that looked like kilos (DE 130, p. 87 & 88). A video tape of the incident was played to the jury (DE 130, p. 83).

"Reel Time" returned to the U. S. and Joel was arrested by surveillance officers when he returned to his home (DE 130, p. 91, 179). The following day, March 7, 2005, agents executed a search warrant on

the Perkins' home and, along with more fake kilos, an actual kilogram of cocaine was found along with approximately twenty-eight thousand dollars ($28,000.00) in cash, all hidden in the closet (DE 130, p. 93, 95; DE 131, p. 27 through 29, 33, 34 & 37). NOTE: The total amount of money seized from Joel's car and house was less than half of the sixty thousand dollars ($60,000.00) discussed as the agent's "fee."

While Perkins was held at the Federal Detention Center in Miami, she made several phone calls which were recorded by the prison officials, including phone calls to Marvin Johnson and these phone calls (and written transcripts) were presented to the jury as governments exhibits number 29, 31, 32, 35, 36, 37 and 43 (DE 131, p. 91 & 92, 105), and none had admissions of actual drug possession.

Perkins and her Husband, Joel Perkins, were indicted in a three count indictment (DE 27) and trial began on July 25, 2005, (DE 71, 128), with no government exhibits reflecting production or possession of actual (as opposed to "fake") drugs. Now co-operating co-defendant / husband did not testify at trial. On July 28, 2005, the jury convicted the Petitioner of conspiracy to import cocaine as charged in Count I; conspiracy to possess cocaine with intent to distribute as charged in Count II and acquitted her of possession of cocaine with intent to distribute as charged in Count III (the cocaine later found in the house – the only cocaine involved in this case) (DE 76, DE 132, p. 3).

ARGUMENT I

Petitioner filed a motion for a certificate of appealability in order to appeal the denial of her 28 U.S.C 2255, which was dismissed as procedurally barred. The Eleventh Circuit states in her denial that "the district court is not required to reconsider claims of error that were raised and disposed of on direct appeal" United States v Nyhuis 211 F3d 1340, 1343 (11th Cir 2000), however, this court states "unless the petitioner can show cause and prejudice to excuse the default or that a fundamental miscarriage of justice will occur." United States v Montana 398 F3d 1276, 1280 (11th Cir 2005).

The doctrine of the "law of the case" would ordinarily preclude reconsideration of its prior decision unless an appeal falls within one or more exceptions to that doctrine which Petitioner meets (1) the prior appellate decision was clearly erroneous

and would work a substantial injustice and (2) new evidence has emerged that differs substantially from that heard in the first appeal. Additionally, this court makes evident that Petitioner should "show cause and prejudice" to excuse the default on issues that could have been raised on direct appeal.

Petitioner, (showing cause and prejudice to excuse default) under belief and impression that appellate counsel would keep her appeal in "direct appeal" status by filing a motion for rehearing or rehearing en banc with the Eleventh Circuit so that she could point to the law and facts that the court overlooked or misunderstood (especially concerning the sufficiency of evidence argument), in addition to material facts that were not adequately developed in trial / appellate proceedings, was ultimately told by counsel "Having repeatedly reviewed the Opinion from the 11th Circuit Court of Appeals and after the

follow-up research, I determined that it was clear and obvious that a motion for rehearing to that same court would be pointless and a waste of your valuable time." (See Exhibit 1). Thus the content of this exchange did not constitute adequate consultation. Perkins expressed interest in rehearing and shows the requisite prejudice that if counsel promptly informed her of his decision not to file rehearing, she would have exercised her right to petition for rehearing pro se.

Petitioner contends that the appropriate procedural option was indeed to file a petition for rehearing or rehearing en banc and that something being "a waste of your valuable time" should have been left to petitioner to decide. However, counsel determined it was "pointless," proceeding with Petition to the Supreme Court.

When this court affirmed Petitioner's convictions at United States v Perkins, No. 05-15810 (11th Cir October 26, 2006) she subsequently learned that court's decision by way of counsel after phoning his office several days after affirmance. Counsel discussed briefly the decision and directed Petitioner to contact him when she had the decision in hand which was sometime around November 4, 2006. Attached, was Counsel's Attorney / Client Correspondence stating he was preparing to file for a petition for rehearing or rehearing en banc. In preparation for this motion Petitioner diligently made many attempts at contacting counsel to go over opinion and express concerns and facts that she believed should be included in said motion. (Telephone log – See Exhibit 2). At Petitioners attempts to contact counsel, having many conversations with his secretary (Bernice),

expressing concern as to expiration date to file the motion in appellate court, inquiring when counsel will be available to go over her ideas and concerns etc. After unsuccessful attempts and realizing time was running out, it was simply too late to mail a letter to counsel expressing her ideas and opinions, so Petitioner approached her counselor Ms. Croft, FCC Coleman Camp, if she could have special permission to fax several pages to her attorney's office, explaining the circumstances and the time restraint of filing a rehearing, expressing that use of U. S. mail at this juncture would not be helpful in getting correspondence to her attorney in a reasonable amount of time. Ms. Croft, in turn, asked her superior Mr. Mark Johnson, Unit Manager, if she could indeed grant the unusual request, which he allowed after hearing the circumstances. Ms. Croft made copies of the documents. Petitioner

subsequently produced counsel's business card to ensure Ms. Croft it was indeed being faxed to appellate attorney. Ms. Croft said she would keep copies of the documents in case she needed to re-fax and that she would put the fax confirmation in her file. After documents were faxed Petitioner called counsel's office to ensure the documents were received so that counsel could have her input before the motion for rehearing was filed. Those pages were faxed sometime around November 9, 2006, and secretary confirmed receiving pages. Eventually, a couple days later Petitioner was told by secretary that her attorney would not be filing the motion. (NOTE – All calls were made through prison telephone system, that is of course "monitored and recorded." So, all the information above is verifiable, as well as Ms. Croft verifying conversation with Petitioner, and her confirming the fax transmission).

After learning that counsel was not planning to file motion by his secretary, Petitioner proceeded to write a letter to her attorney expressing her disappointment in his not filing the motion for rehearing or rehearing en banc. In response counsel's November 16, 2006 Attorney / Client Correspondence stated "I determined that it was clear and obvious that a motion for rehearing to that same court would be pointless and a waste of your valuable time." Even with the Nov 16 date on letter it was simply too late to file the motion pro se, that Petitioner contends would have produced countervailing considerations of law and facts, inducing that court to reverse its prior opinion, in addition to convincing the court that petitioner's interests were at odds with her co-defendant and Johnson and that her case involved significant issues not at stake in her co-defendants case.

In the courts there is no recognition of ineffective assistance of counsel in pursuing motions for rehearing or rehearing en banc after denial of a direct appeal, nonetheless, Petitioner's counsel informed petitioner he was preparing the motion in his letter to her after the denial from the Eleventh Circuit. In turn Perkins acted in a manner for success of the petition and to ensure it was done in a timely manner. She did not need to insist or pursue the motion as counsel stated he was preparing the motion. Counsel then abandoned the petition without meaningful consultation or prompt notification to Petitioner that he, in fact, decided against filing the petition because he did not believe it would have a reasonable chance for success. This information came at a time when it was too late to file on her own, only after inquiries were made by Perkins, believing attorney was actively pursuing

rehearing, when he, in fact, was not. Petitioner is now left with the question of prejudice to presenting her arguments.

Under the plan of the Criminal Justice Act (f) duties of appointed counsel (5) "If the decision of this court is adverse to the client, counsel shall inform client of the right to file a petition for rehearing or petition for rehearing en banc" or petition the Supreme Court for certiorari. Petitioner's counsel on sole judgment bypassed rehearing and petitioned the Supreme Court without promptly informing client of the right to file on her own especially after she expressed clear interest in proceeding with the rehearing, thus resulting in a loss of a right to file. This court must decide if counsel had an affirmative duty to consult whether a petitioner would meet the "cause and prejudice" component under these circumstances, can petitioner seek reinstatement of

her right to appeal or has alleged enough facts to warrant at minimum an evidentiary hearing? As petitioner's only option after the Supreme Court denied certiorari made the best of a bad position and filed for habeas relief. Arguing amount other things that the Eleventh Circuit states it is "bound by the holding of the prior panel opinion." And unless this court does not mean what it has said, one cannot be convicted of conspiracy to import and conspiracy to possess with the intent to distribute when defendant in the seller / importer position has in fact supplied a harmless non-controlled substance.

In regards to the claim upon newly discovered evidence of her husband speaking with an undercover officer, that court stated, "The fact that her husband made a false statement to the undercover officer could have been discovered before trial. The defense was free to speak with Petitioner's

husband and to question him regarding the veracity of his statements. Additionally, this alleged new evidence did not exonerate Petitioner or show that she did not participate in the conspiracy."

Appellate counsel filed a motion for early production of witness statements on July 14, 2005, which makes evident on page 3 and 4 of that motion dealing in regards to statements "to learn even the most basic points of his testimony through his proffer or his previous statements," in which the district court in an omnibus order July 15, 2005, denied the motion "without prejudice to the Government's voluntary supplying the materials earlier than required."

The Petitioner contends this is indeed new evidence and his puffery and braggadocio is so deceptive that no jury should rely on its exaggerated statements. Before trial Petitioner spoke with

counsel in regards to her husband's statements on audio recordings, relayed that much of the contents on recording were not true. Many things were claims, that were not and could not be produced, nor would co-defendant have realistic insight to say much of what was said. Petitioner explained to counsel that her husband had spoken with her as much as he could by way of letters in which one letter in particular he wrote, "I feel like this is all my fault," (Exhibit 3) and speaking generally before court appearances, as the government placed separate T's between co-defendants, giving no way of communicating such as "family visit" or "strategy sessions" with attorneys. Going over some audio recordings and pointing out all the information petitioner believed as to the veracity of co-defendant statements to her attorney.

Counsel then presented Petitioner with an Attorney / Client Correspondence (which Petitioner and attorney signed) on July 18, 2005, that chronicled several meetings, conversations, plea offers, and in fact "the decision to go to trial in this matter" (See Exhibit 4, which consists of pages 4, 6, and 9 of that correspondence). In regards to Petitioner's husband and his statements Petitioner was informed of the following:

(page 4)

> "You will recall that I tried to assure you that Joel <u>was</u> going to testify against you, and he will verify and corroborate everything in the meetings and the tapes. I did not (and I do not) want you to make this decision to go to trial thinking that Joel will "save" you at the last minute, that he'll refuse to testify, or that he will protect you or minimize your role. He

can't – once he pleads guilty, he must follow through or he will get the 151, 188 or 200 – plus months in prison – and he's not going to take that sentence for you."

(page 6)

"It seemed that you still did not believe that your husband would testify against you at the trial and you brought me a few of his letters to you (as I had requested) while also mentioning that you spoke to him before court and he was still reassuring you. Frankly, Leslie, it was not until Joel and his lawyer finally stood up before the court he plead guilty that you finally started to believe what I was telling you. This reality seemed to hit home with the Government went through their detailed facts of the case – facts which Joel acknowledged

and facts which Joel will testify about at your trial, against you."

Petitioner contends first that her husband did not testify against her at trial and he, in fact, did not "corroborate everything" in the meetings and the tape. As new evidence shows he has admitted that "I made statements about things that were not true so as to create the belief that we had been involved in drug deals of considerable size." "... and made statements about producing money in order to pay for the drugs even though I did not have the fund needed."

The prosecutor / government did not disclose any "evidence favorable to the accused," as this evidence was certainly material to her guilt and punishment. Appellate counsel assured her he was going to testify, "corroborate everything in the meetings and the tapes," which concludes counsel's

failure to conduct interview. Relying on government files for his pretrial investigation and Petitioner was prejudiced by counsel's failure to make an independent investigation of the facts and circumstances of the case, which left Petitioner proceeding on that basis with only the information provided to her not to bring him in as a witness, even stating in court that no witnesses would be called even when it was evident her husband would not be called as a witness for the prosecution.

These statements were certainly considered new evidence to Petitioner and the court. Counsel was made aware of the statements shortly after Petitioner received the information. The district court should have held at the least on evidentiary hearing to focus on what type of "indicia of reliability" had been presented to the jury, or whether this adverse witness should have been

required to testify, as these untruths were not a part of trial record.

These recordings were used as a basis for decision in pre-trial proceedings to misrepresent material facts heard by jury, testimony given by Agent Matschner as to these recordings, opening and closing arguments and options on verdict form.

ARGUMENT II

The Supreme Court has laid a foundation addressing the issue of "defeat" in US v Jimenez Recio 537 US 270 (2003) that a "Criminal conspiracy held not to end automatically when government, unbeknownst to some of conspirators, intervenes to "defeat" conspiracy's objective, making objective impossible to achieve." While Petitioner Perkins conduct is in complete opposite whereas Criminal Conspiracy ended when conspirators, unbeknownst

to government, intervened to "defeat" conspiracy's objective, making objective impossible to achieve.

Petitioner's issue has been properly preserved in the Eleventh Circuit that Perkins conduct was not criminal. The Doctrine of Stare Decisis "is a principle the decisions should stand as precedents for guidance in cases arising in the future and does not attach to such parts of the opinion of a court as are mere dicta," Ballentine's Law Dictionary. It was a complete miscarriage of justice that the holdings pertaining to Perkins have been denied to her, in fact, ignoring what she has plainly said in favor of a presumption. The Eleventh Circuit adopted a binding precedent of all Fifth Circuit decisions handed down prior to the close of business on Sept 30, 1981 Bonner v Pritchard 661 F 2d 1206 (11th Cir 1981) and follows the absolute rule of the Fifth Circuit that the prior decisions of that circuit (panel

or en banc) cannot be overruled by a panel but only by the court sitting en banc.

Petitioners conspiracy conviction cannot be sustained when the government's evidence shows that a defendant was indifferent to the conspiracy's outcome altogether. When Petitioner stated in Government's Evidence N4 that "the guy would just be happy just being here without all this extra whatever," she showed indifference. When the conspiracy ended "without all this extra whatever," she demonstrated defeat.

The Eleventh Circuit made assumptions of other intents even when conspirator's actions decreased the likelihood that the criminal objective will be successfully attained and increased the probability that individuals involved will depart from their path of criminality. Actions making it legally impossible to commit the crime, and the holdings for

the Eleventh Circuit shows her conduct was not unlawful.

The Eleventh Circuit reached a result in defiance, of Federal law and holdings, thus the Court now has cases reversing and remanding for dismissal conspiracy convictions on virtually the same set of circumstances. The panel's ruling in the first appeal was not dictated by the decisions of other panels on the same issues in previous cases and failed to acknowledge a case nearly identical to Petitioner Perkins, that was controlling law and binding precedent.

In Binetti II, like Murray the convictions for conspiracy to possess and distribute cocaine, intentionally possessing with intent and intentionally distributing cocaine were reversed and remanded for dismissal – after the Binetti conviction was originally upheld by the same Court in US v

_____ 547 F2d 265 (5th Cir 1977). In Binetti I, the Court noted evidence that there was, in fact, "a criminal venture and that Binetti, associated himself in some way" – Binetti arrived with the drug seller, provided directions to the agents to meet the seller, and waited with one of the agents while the business was conducted Id p268.

However on rehearing, the conviction was reversed when the Court realized:

> "the sale on ... the day on which Binetti first took an active role, although supposedly to be of cocaine, the substance was in fact a harmless, non-controlled substance used to cut cocaine, called Lidocaine, which King ((Binetti's associate)) was passing off to the agents as cocaine. No cocaine was possessed or distributed by anyone on that date" Binetti II 552 F2d at 1142.

And went on to hold:

> "..although before May 24 the defendant apparently had knowledge that his associates were selling cocaine, that knowledge without more is not enough to sustain his conviction of conspiracy. When he actually became more than a knowing bystander, it was Lidocaine and not cocaine which the agent received from King, thinking it was
>
> cocaine." Id pg 1142

Like Binetti, the transaction for which Perkins took an active role, although supposedly to be of cocaine, the substance was, in fact, **boxes of <u>macaroni</u> taped together,** a harmless, non-controlled substance which Johnson ((Perkins associate)) was passing off to the agents as cocaine. No cocaine was distributed by anyone on that date. When she actually became more than a 'knowing bystander" there was no

cocaine which the agent received from Johnson, thinking it was cocaine, so there can be no conspiracy conviction sustained by this, or any of these types of cases.

For Murray, the panel on Petitioner's case made a distinction, using dicta, that Murray not only sold fake dope but his actions are consistent with someone who wanted to sell fake dope.

In United States v Murray 527 F2d 401 (5th Cir 1976) distinguished by the Eleventh Circuit Opinion, the Court reversed a conviction for conspiracy to possess heroin, finding the evidence wholly insufficient. The only evidence against him from which a conspiracy could be inferred was Murray's participation in the surreptitious sale of lactose in a clandestine and suspicious manner, and although he indicated that he was selling dope, he sold lactose and not dope, and the Court found that

"his actions and declarations are equally consistent, if not more so with an intention to sell a counterfeit substance." Pg 409 It must be noted that there was the additional evidence against Murray not found in this case against Petitioner, as Murray later stated to the undercover agents that he "thought the dope was good" and later stated "someone else had stolen the dope and substituted lactose." Pg 409. The Court states in summary:

> "Finding insufficient evidence to convict Petitioners, Arthur Jackson Douglas, Elbert C Douglas, Jr., Leon Buhl, Jr. and Hargis Ray Murray of conspiracy, we reverse as to that charge."

> And "We find it unnecessary to determine whether the evidence concerning E. C. Douglas' participation in the lactose

transaction was sufficient to connect him with a conspiracy in view of the heavy additional proof that he was intricately involved in other illegal drug transactions."

The Court is reminded that a supposed agreement of Sixty Thousand Dollars ($60,000.00) fee to be paid to agent was not produced, there was insufficient money to satisfy that agreement, (Note: New Evidence by Co-conspirator Perkins admitted on the record that he was deceiving agent (Argument IV). The only money that was exchanged amounted to five hundred dollars ($500.00) for boat fuel. At virtually every meeting and initial request Joel Perkins insisted the Bahamian be allowed to return to the United States on the undercover vessel. Agent Matschner testified (Volume 2, Transcript of jury trial P144) that Leslie Perkins told him (referring to Government Exhibit 3, Evidence N4, recording on

2/28/05) "but really the guy would just be happy just being here without all this extra whatever" and "it didn't have to be that way you know" and Petitioner confirmed the statement again in "jailhouse recording" (Exhibit 35), "saying from the beginning is all he you know, he would just be happy being here." And, in that statement alone, shows Petitioner had "nothing to gain by importing" an actual illegal substance as 11th Circuit made note of.

Petitioner Perkins arrived with Johnson and another male. Johnson handed cooler containing counterfeit substance and boarded the vessel with United States destination (Agent testified he was not allowed to board). Mr. Johnson was then pushed overboard into the ocean, demonstrating substantial steps that strongly corroborated the "firmness of the defendant's intent."

The discussions of a "turn around" trip that was suggestion and proposal only by Agent Matschner in (2/14/05) evidence N1 pg 19:

U/C: But what's gonna happen is we are gonna have to turn around
and fucking head right back out

Joel: Right

U/C: I mean I'm not gonna kid you Saturday morning we have to have that fucking boat over there, no doubt about it. We may be able after that to make another run because he flies...

2/22/05 evidence N2 pg 6:

U/C: Um, cause that's what I am trying to think how soon does he
want to do another haul?

Joel: He can do it. **If you** want to do a turn **he may** want to do a turn around...

2/28/05

And in evidence N4 pg5:

> Joel and Petitioner, Perkins, stated that if his offer was taken up "that's the guy that's gonna be makin' that call with you **that's between you two** ((Johnson and Agent)) if you wanna make a quick turnaround.

The declarations of Petitioner that Johnson wanted to come to the United States "without all this extra whatever" combined with the actions of what actually happened, Johnson handing a cooler filled with a non-controlled substance and boarding the vessel only to be shoved into the ocean are consistent

with someone who only intended to smuggle Johnson into the U. S. Petitioner's declarations that he would just be happy to be here "without all this extra whatever" was exactly how the alleged conspiracy ended "without all this extra whatever." The Eleventh Circuit ignored what was plainly said by Petitioner.

Evidence shows Petitioner had no interest or decision making power to Agent's proposition nor the capability to produce or shown her "stake in the proceeds." Petitioner's opinion concludes that the "turn around trip" or test run could be inferred. That would be passing a dicto secundum quid ad dictum simpliciter. It is not enough to say that discussions or contemplated propositions from the agent was an agreement, or that conspirators had other intents of "unaccepted offers and much tentative talk" United

States v Iennaco 282 U.S. App D. C 187, 893 F2d 394 at 398 (D. C. Cir 1990)

Below are the holdings noted by multiple panels of these binding precedents that have not been overruled by an en banc court, yet has been disregarded:

> United States v Binetti 552 F2d 1141 (5th Cir 1977): "The court reversed defendant's convictions, **holding** that the evidence was wholly insufficient to support the convictions, because no cocaine was possessed or distributed by anyone on the date defendant allegedly committed the offenses."
>
> Quoting United States v Pietri 683 F2d 877 (5th Cir 1982) "We simply **held** that Binetti's knowledge that his associates were selling

cocaine prior to the transaction he was involved in was not sufficient to sustain his conviction of conspiracy to possess and distribute cocaine when the substance which he sold actually was not cocaine."

Quoting United States v Rey 641 F2d 222 (5th Cir 1981) "The district court granted acquittal on Counts Two, Four, and Five because the telephone conversation for each count concerned only sham heroin. Since possession of a sham substance is not an offense, United States v Binetti, 552 F2d 1141 (5th Cir 1977), the court **held** that facilitation of such possession is also not an offense."

Quoting United States v Bobo 586 F2d 355 (5th Cir 1978) "It has been **held** that one who sells

lactose representing it to be heroin cannot be convicted of participating in a drug conspiracy because he probably intended only to sell a counterfeit substance US v Murray 527 f2d 401 (5th Cir 1976)."

Because these decisions are binding authority, not dictum Petitioner's majority thus bypassed stare decisis and law of the case. A court is bound by holdings not unwritten assumptions Brecht v Abrahamson 507 US 619, 630 – 631 113 s ct 110 (1993).

"Although it is unusual for one panel to acknowledge that it is overruling another, a panel may overturn precedent implicitly, by simply ignoring it," quoting United States v Valencia 669 F2d 37 (2nd Cir 1980).

The government must prove beyond a reasonable doubt that there existed an agreement between two or more persons to import narcotics into the United States, and that the Petitioner knowingly and voluntarily participated in that agreement. United States v Arbane 446 F3d 1223, 1228 (11th Cir 2006).

The actions of Petitioner are consistent with Binetti II, Murray and Oviedo and like those cases under the Doctrine of Stare Decisis Petitioner's convictions should be reversed and remanded for dismissal. The Doctrine of Stare Decisis requires the Court to adhere to its binding and controlling law and that "like facts will receive like treatment in a court of law."

This court must resolve the error in Petitioner's case. Like Binetti II, the Court in United States v Oviedo, 525 F2d 881 (5th Cir 1976) reversed

a conviction for attempted distribution of heroin, Distinguishing Legal Impossibility and Factual Impossibility. Although the reviewing Court found that Oviedo "sold a substance he thought to be heroin, which in reality was an uncontrolled substance" Id p. 883, and despite the fact that Oviedo had similar substance hidden in a television set in his apartment, Id p.882, the Court held that it is reasonable to infer that a defendant know the "physical nature" of the substance" when he sells a specific substance, but, if Oviedo's conviction of attempting to sell heroin for the sale of the non-narcotic Procaine was upheld, "we eliminate an objective element that has major evidentiary significance and we increase the risk of mistaken conclusions that the defendant believed the goods were narcotics." Pg 885. The Court went on to hold:

"Thus we demand that in order for a Defendant to be guilty of criminal intent, the objective acts performed without any reliance on the accompanying mens rea, mark the Defendant's conduct as criminal in nature" P 885

When the Court states it is reasonable to infer that a Defendant know the "physical nature of the substance" when he sells a specific substance is pertinent to Petitioner as her panel opinioned:

"there was no evidence that Leslie Perkins knew that the cocaine was fake, and the jury could infer that she did not know"

The panel in Oviedo would dictate that Petitioner should know (and did know) "the physical nature of the substance".

In Petitioner's, pro se, renewed motion for new trial on Sept. 28, 2005, she states:

"I knew there were never going to be any drugs brought here and what was intended never took place because the Bahamian was pushed off the boat"

The conclusion in Oviedo was ignored by Petitioner's panel.

"Oviedo stated he would sell heroin and then sold Procaine. Based on these objective facts, we cannot infer that he intended to do that which he said he was going to do, because he in fact did something else" p 886

See United States v Bobo, 586 F2d 335 (5th Cir 1978) in which the Court cited and followed Murray and made the distinction between the two types of cases and finding defense in Murray is not available to a conspirator in the opposite position:

"The same logic does not apply to someone who buys what is represented to him to be heroin

and pays thousands for it. The inescapable conclusion is that he thought he was buying heroin" p 371

In United States v Sanders 979 F2d 87 (7th Cir 1992), the Seventh Circuit affirmed conspiracy to possess cocaine with the long-standing distinction between "buyer" and "seller" cases, the agents were supposedly supplying the cocaine to the buyer Sanders, but used a counterfeit material instead. The Court found the "prop substance" was immaterial and that the government's prudent use of plaster of paris does not change Sander's ability of his intent to buy the real thing; United States v Pietri 683 F2d 877 (5th Cir 1982), where noting the logical and obvious distinctions between Oviedo and Binetti, the conspiracy conviction was upheld because Pietri's "intent to obtain the genuine article" was present p 879.

A federal habeas court can grant the writ in the absence of a showing of cause and prejudice for the procedural bar as Perkins has shown a fundamental miscarriage of justice. The Due Process Clause, Article III, Equal Protection, nor Eighth Amendment would tolerate her conviction.

ARGUMENT III

The court of appeals for the Eleventh Circuit stated, "with no substantive arguments to consider on these points, we do not address them." Appellate counsel for petitioner failed to include the substantive argument after presenting the issue, therefore, it could not be disposed of properly since it was not addressed. The federal habeas courts said it is now procedurally barred.

In order to use the telephones at FDC Miami you are required to sign a consent form. The most pertinent portion of the consent states: "said

monitoring to be done to preserve the security and orderly management of the institution and to protect the public."

The petitioner acknowledges signing the consent, and concedes no expectation of privacy when in custody of Bureau of Prisons (BOP) in its "ordinary course" of duties, nor does the petitioner argue that they were illegally recorded or improperly disclosed to DEA and prosecutor. Petitioner does argue that calls in no violation of consent were played for the jury, and there was no probable cause to believe that defendant was furthering a conspiracy, involved in new crimes, or threatening security of the institution, in contrast to the cases reviewed in Appellate Circuits where they foretold of their intention to kidnap, kill, witness tampering, escape, obstruction of justice, etc.

Petitioner argues that her conversations improperly became the focus of the trial and prejudice overcame any possible probative value. The conversations played for the jury of defendant talking with family and friends did not contain any directly incriminating statements. However, the contents of seven (7) recordings are incriminating when considered in the context of the circumstances of the Petitioner's arrest. Especially when Petitioner, Perkins, and supposed co-conspirator, Johnson reference each other, although he was not arrested as a result of the same incident or incarcerated with the petitioner. These facts were disputed issues at trial. Petitioner signed and gave consent for calls that were written policy and regulation of FDC Miami and with that purpose the court should find the government pursued the prisons "ordinary course of business" in using post-

arrest recorded conversations as part of an investigation, which is clearly separate from the function of the facility or protecting the public.

When a criminal defendant signs a consent based upon the circumstances at hand and based on the plain language of the agreement, Perkins asserts that it would not be reasonable to believe that she would sign a consent form knowingly, willingly, or intentionally, therefore invalidating any rights she has preserved when she has not violated the plain language of the consent. And contends she would not have signed consent under these conditions that her "jailhouse recordings," in no violation of consent would be used against her in a court of law. The court overlooked the language in the agreement.

The DEA and prosecutor used prison security as a guise for what was essentially an effort to gain

incriminating evidence for use against defendant in trial.

Defendant's counsel arguing motion in limine talks about security of prisons and how these recordings should not be admissible on page 6 and 7 (Transcript of Hearing July 20, 2005). The issue was raised again by Petitioner (pro se) for motion for new trial. Sept 28, 2005.

The prejudice was reflected from statements with alleged co-conspirator Marvin who could not be arrested because there was no probable cause as a result of the same incident. These recordings were very significant to trial proceedings because without them, the prosecution would have only **one** recording of defendant on 2/28/05, and her showing up with a boat and producing a fake substance and an alleged co-conspirator trying to board a boat that agents testified he was not allowed to board. Defendant

stated in that **one** recording (Evidence N4) "but really the guy would just be happy just being here without all this extra whatever" and "it didn't have to be that way you know.".

This argument poses a question of constitutional right, as meaning of good faith within the Bureau of Prisons and the government that her statements were used and played for the jury that was outside the scope of consent.

Virtually every Federal judge that addresses this issue concludes that the Fourth Amendment rights are not violated because of the consent whether expressed or implied. Petitioner has expressed and expected no expectation of privacy as prisons are acting in the "ordinary course of their duties" with her express consent (Exhibit 5), but questions rather is she without constitutional protection.

It s well-settled that one of the specifically established exceptions regarding searches is that it will be valid if it is conducted pursuant to the defendants consent Schneckloth v Bustamonte 412 US 212, 219 (1973). Factors that should have been considered in evaluating circumstances was, 1. Petitioner exercised her right to remain silent, 2. Plain language of consent for its purpose and, 3. Petitioner's belief, that no incriminating evidence would be found (as none was found), through the misrepresentation of the BOP and government acting outside the scope of consent.

The consent seemingly gives a blanket grant of permission to use contents of recorded conversations any way a prosecutor desires without actually taking into account that a defendant has not violated consent or gave authorization that extended past prison security or public protection. Petitioner's

recordings were used in an investigatory purpose as relevant evidence in trial and no determination of consent violation was reached in the District Court. This went beyond permission granted by Petitioner and it is fundamentally unfair to allow prosecutors to benefit in the disclosure of the contents of conversations to a jury that was in no way a violation of the agreement between an incarcerated individual and Bureau of Prisons. This is not a case of mere listening on the governments part, the prosecutor took action in using these recording in trial aware it would produce no new charges or result in any disciplinary action by the BOP, but rather to strengthen governments case against Petitioner.

This court should decide whether Perkins' consent was broad enough to include recordings in no violation of consent to be used in evidentiary nature in trial, as the issue should not have been regarding

prejudice but rather should the conversations be suppressed entirely because there was no violation.

"The scope of a search is generally defined by its expressed object" US v Ross 456 US 798 (1982).

In US v Rosario – Diaz, 202 F3d at 54, 69 (1st Cir 2000) "to establish consent to search government bears burden of demonstrating consent was product of a 'free and deliberate choice, made with full awareness of the nature of the right being abandoned and the consequences of the decision to abandon.'"

"When breach is alleged and disputed the court should consider, using an objective standard whether the government's actions are inconsistent with what the defendant reasonably understood when entering his guilty plea" US v Nelson 837 F2d 1519 (11th Cir 1988).

The Supreme Court should settle this ongoing and reoccurring issue of suppression of "jailhouse

recordings," whether the purpose of express consent to monitor and record telephones within the BOP is a legitimate interest or to serve some other law enforcement purpose.

Does the Supreme Court have the inherent authority to correct "consent" within the BOP that notifies its inmates that their conversations may be used for purposes other than those purposes that justified and constituted monitoring? Or is this consent a complete waiver of rights with no constitutional protection?

ARGUMENT IV

Petitioner has satisfied the five requirements that a new trial should be granted on her newly discovered evidence.

1. The evidence was discovered after Petitioner's trial on July, 2005. The statement of Mr. Perkins was known to the

court by co defendant's sentencing date of September 22, 2005, and was discovered after Petitioner's sentencing date of Oct 6, 2005. Statement reflected in co-defendant's PSI.

2. Discovery of evidence was not due to lack of diligence. Petitioner filed motions for early production of witness statements on July 14, 2005. Prosecutor may have been aware of these statements by its cooperating government witness, Mr. Perkins, before Petitioner's trial, since being debriefed. In Brady v Maryland 373 US 83, 10 Led 2d 215, 83 S CT 1194 (1963) "the suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective

of the good faith or bad faith of the prosecution" 373 US at 87.

3. The recordings are not merely cumulative or impeaching, as these misrepresented recordings for which Mr. Perkins provided no testimony for, were used as a basis for decisions in the pre-trial proceedings to misrepresented material facts heard by jury, testimony given by Agent Matschner as to these recordings, opening and closing arguments and options on verdict form. This would not be "impeaching to the testimony of Joel Perkins, had he been called to testify." His statement contradicts the recordings (in furtherance of the conspiracy), and had Mr. Perkins testified he would have contradicted the recording, thus not impeaching to Mr.

Perkins, but confirming governments evidence is unreliable. Declarant's credibility on these recordings are questionable.

4. The evidence is material to issues before the court as Joel Perkins made an official statement to the government as to these recordings. "I made statements about things that were not true so as to create the belief that we had been involved in drug deals of considerable size." "... and made statements about producing money in order to pay for the drugs even though I did not have the funds needed." This evidence differs substantially from that heard in trial and direct appeal.
5. The evidence is such that a new trial would probably produce a different result. With

this admission after Petitioner's trial, that Mr. Perkins was 'puffing' to impress or deceive Agent, along with what was actually produced was a fake substance, along with Declarations of Petitioner would create a reasonable probability the outcome at trial would have been different had he testified.

The tapes did not accurately represent the intent of the participants. The overt act was carried out to its end and unbeknownst to government agents, participants did not have drugs, nor funds supposedly agreed upon, but in fact, Mr. Johnson did attempt to board the vessel.

The version of events set forth in recordings are fictitious and not worthy of belief, and Mr. Perkins admitted, "I made statements about things that were not true." "Circuits have suggested that

sufficient inducia of reliability are shown by factors including sworn statements, in-court testimony observed or recorded statements or corroborating evidence" US v Fennell 65 F3d 812, 814 (8th Cir 1995). Mr. Perkins' statements are reflected in his PSI.

> In US v Gates 10 F3d 765 (11th Cir 1993), "the defendant moved for a new trial based in part on an affidavit by a convicted co-defendant presenting post trial statement that tended to exculpate the defendant. In reviewing the district court's denial of the motion for a new trial without benefit of an evidentiary hearing, this court held that while such post-trial statements must be viewed with care, the motion could not be denied without a hearing to explore further and determine whether it has any merit." 10 F3d at 765.

District court has a duty to base judgments upon reliable and accurate information and must consider all available evidence, including evidence that conflicts with what has been adduced at trial and Petitioner's Due Process rights have been violated because conviction was obtained from unreliable recordings and testimony by Agent with regard to recordings.

Petitioner's argument regarding Mr. Perkins statements are overpowering as to the perception the jury relied on and no doubt believed. So much so that Agent Matschner pursued an investigation with Mr. Perkins statements of what he could do, and how he has performed in the past, despite the fact that no cocaine was produced and no samples given. And although not on the record, Mr. Perkins request began with bringing a person to the United States,

and if he were to testify truthfully he would relay this to the Court. Nor did Joel Perkins admit to a "test run" in his official statement.

Petitioner's right to confront was violated "the confrontation clause commands that reliability be assessed in a particular manner." Crawford v Washington 541 US 36, 124 S CT 1354 (2004). Federal Rule of Evidence 801 (d) (2) (E) provide that 'a statement by a co-conspirator of a party during the course and in furtherance of conspiracy' is not hearsay and consequently, may be offered in evidence for the truth of the matter. See California v Green 399 US 149, 155-56 (1970). "However, the Supreme Court reminds lower courts that it has" more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized heresay

exception" (quoting US v Scott 69 Fed Appx 317 (6th Cir 2003).

"The focus of the court's concern has been to insure that there 'are indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant Dutton v Evans, Supra at 89 ((91 S Ct at 220)), and to afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement." California v Green, Supra at 161 ((90 S ct at 1936))." Mancusi v Stubbs, 408 US 204 at Supra, at 213, 92 S CT at 2313.

In light of new evidence that Petitioner has obtained the governments decision not to call co-defendant husband after being debriefed on the critical events of the case might give one pause on the reliability of the government's evidence in question.

In presenting its theory that defendant was merely "puffing" and telling stories in dealing with Agent, requires new trial with the admission of his statements pursuant to Fed. Rule of Evidence 806 or require Mr. Perkins to testify.

Federal Rule of Evidence 806 provides in relevant part:

When a hearsay statement, or a statement defined in Rule **801 (d) (2)** (C), (D), or **(E)** has been admitted in evidence, the credibility of the declarant may be attacked, and if attached may be supported by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time inconsistent with the declarant's heresay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to

deny or explain "US v Grant 256 F3d 1146 (11th Cir 2001).

Information upon which the jury relied was inherently unreliable, and was a misrepresentation of material facts, in turn misleading the jury. This court must use its discretion in realizing those misrepresented material facts on recordings were error and damaging, and has affected defendant's fundamental rights.

The district court states "at best, it merely reinforces the suggestion that Joel Perkins and presumably his wife, Petitioner, were anxious to enter into the drug deal." The District Court is very presumptuous and yet another example of a dicto secundum quid ad dictum simpliciter. Both, the jury and now the district court have made decisions based on two different assumptions. Had the information been disclosed and used effectively, it would have

made the difference between conviction and acquittal.

CONCLUSION

It is of great public importance and essential to the proper administration of justice for this court to use its discretionary power to address and resolve the issues as relief cannot be obtained through any other forum.

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Petitioner, Pro Se
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Supreme Court, U.S.
FILED

071518 MAR 24 2008

OFFICE OF THE CLERK

DOCKET NO : _____

IN THE
SUPREME COURT
OF THE
UNITED STATES

LESLIE PERKINS,
Petitioner,
Vs.

UNITED STATES OF AMERICA
Respondent

ON PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

SECOND BOOK

Leslie Perkins (57160-004)
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IN THE UNITED STATES COURT OF

APPEALS FOR THE ELEVENTH CIRCUIT

NO. 07-13577 – F

FILED
US COURT OF APPEALS
ELEVENTH CIRCUIT

NOV 08, 2007

THOMAS K. KAHN
CLERK

LESLIE PERKINS,
Petitioner- Appellant,
versus

UNITED STATES OF AMERICA,
Respondent – Appellee.

Appeal from the United States District Court for the Southern District of Florida

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ORDER:

Appellant has filed a motion for a certificate of appealability in order to appeal the denial of his 28

APPENDIX A [1]

U.S.C. § 2255 motion to vacate, which was dismissed as procedurally barred. In Slack v McDaniel, 529 U.S. 473, 484, 120 S.Ct. 1595, 1604, 146 L.ED.2d 542 (2000), the Supreme Court held that, where the district court has denied a habeas petition on procedural grounds, the petitioner must show that jurists of reason would find it debatable whether (1) the district court was correct in its procedural ruling, and (2) the petition state a valid claim of the denial of a constitutional right. If the petitioner fails to satisfy either prong of this two-part test, a court should deny a certificate of appealability. Id.

In his § 2255 motion, appellant raised the following claims:

(1) the admission of audio recordings during trial violated her Sixth

Amendment right to confront and cross-examine witnesses;

(2) the district court erred by admitting recordings of telephone conversations she had while in jail;

(3) the district court violated her Sixth Amendment rights by enhancing her sentence on the basis of facts not found by the jury beyond a reasonable doubt; and

(4) the evidence was insufficient to support her convictions

Each of the appellant's claims either was raised on direct appeal or could have been raised on direct appeal. "The district court is not required to

reconsider claims of error that were raised and disposed of on direct appeal," United States v Nyhuis, 211 F.3d 1340, 1343 (11th Cir. 2000). Additionally, the district court generally does not address issues that could have been raised on direct appeal, unless the petitioner can show cause and prejudice to excuse the default or that a fundamental miscarriage of justice will occur. United States v. Montano, 398 F.3d 1276, 1280 (11th Cir. 2005).

Appellant's first claim could have been raised on direct appeal. Appellant argued that this claim was based upon newly discovered evidence that the audio recordings of her husband speaking with an undercover officer, which were admitted during trial, contained false information. She maintained that, after trial, her husband, a codefendant, admitted that he lied to the officer posing as a coconspirator about his drug dealing to create the belief that he

and the appellant had been involved in large drug deals and that they had sufficient funds to pay for the drugs, when they did not.

In order to obtain relief based upon a claim of newly discovered evidence, a movant must show that: (1) the evidence was discovered after trial, (2) the failure of the defendant to discover the evidence was not due to a lack of diligence, (3) the evidence is not merely cumulative or impeaching, (4) the evidence is material to issues before the court, and (5) the evidence is such that a new trial would probably produce a different result. Lynn v. United States, 365 F.3d 1225, 1237 (11th Cir. 2004).

Appellant failed to establish she was entitled to relief. The fact that her husband made a false statement to the undercover officer could have been discovered before trial. The defense was free to speak with the appellant's husband and to question

him regarding the veracity of his statements. Additionally, this alleged new evidence did not exonerate appellant or show that she did not participate in the conspiracy. Therefore, appellant failed to show cause or prejudice for her default and this claim was procedurally barred.

Appellant's second, third, and fourth claims were raised on direct appeal and rejected by this Court. See United States v. Appellant, No. 05-15810 (11th Cir. October 26, 2006) (unpublished opinion). With respect to her third claim, that the district court erred in admitting audiotapes of telephone calls she made from jail, appellant argued that this claim was not procedurally defaulted because appellate counsel was ineffective for failing to make certain substantive arguments in support of this claim on direct appeal. Appellant argued that, although she signed the consent form and had no

expectation of privacy, she would not have signed the form had she known the calls could be used against her in court. She also maintained that the calls should not have been played for the jury because there was no probable cause to believe that she was furthering a conspiracy, involved in new crimes, or threatening the security of the jail when she made the calls.

Appellant did not demonstrate that counsel failed to raise a meritorious legal challenge to the admission of the recordings on appeal. She admitted that she consented to the recording of the conversations and had no expectation of privacy. Additionally, she did not demonstrate she was prejudiced. She did not explain the substance of the conversations or how these recordings affected the outcome of her trial. Therefore, she failed to

demonstrate her counsel was ineffective and could not overcome her procedural default.

Appellant's motion for a certificate of appealability is DENIED because appellant has failed to show that the district court's procedural ruling is debatable. Slack, 529 U.S. at 484, 120 S.Ct at 1604, 146 L.Ed.2d 542 (2000).

"s/"
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF

APPEALS FOR THE ELEVENTH CIRCUIT

NO. 07-13577 – F

FILED
US COURT OF APPEALS
ELEVENTH CIRCUIT

DEC 27, 2007

THOMAS K. KAHN
CLERK

LESLIE PERKINS,
Petitioner- Appellant,
versus

UNITED STATES OF AMERICA,
Respondent – Appellee.

Appeal from the United States District Court for the Southern District of Florida

---

Before ANDERSON and HULL, Circuit Judges.

BY THE COURT:

Appendix A

Appellant has filed a motion for reconsideration of this court's order dated November 8, 2007, denying her motion for a certificate of appealability. Upon reconsideration, appellant's motion for a certificate of appealability is DENIED because appellant has failed to make the requisite showing. 28 U.S.C. § 2253 (c) (2); Slack v. McDaniel, 529 U.S. 473, 484, 120 S.Ct. 1595, 1604, 146 L.Ed.2d 542 (2000); United States v. Montano, 398 F.3d 1276, 1280 (11th Cir. 2005); United Sates v. Nyhuis, 211 F.3d 1340, 1343 (11th Cir. 2000); Walker v. Jones, 10 F.3d 1569, 1572 (11th Cir. 1994).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 07 – CV – 60559

LESLIE PERKINS,
Movant,
Vs.

UNITED STATES OF AMERICA,
Respondent.
_____/

ORDER DENYING MOTION TO VACATE

THIS CAUSE is before the Court on the Movant, Leslie Perkins', Motion to Vacate, Set Aside or Correct Sentence Pursuant to Title 28 U.S. C. Section 2255 ("Motion to Vacate"). The Court has reviewed the Motion to Vacate, the Government's Response, Movant's Motion to Reply to Government's Response [sic] and pertinent portions of the record. For the reasons discussed below, the Motion to Vacate is DENIED.

BACKGROUND

APPENDIX B [1]

Movant and her husband, Joel Perkins, were indicted and charged with conspiracy to import five kilograms or more of cocaine into the United States (Count I); conspiracy to possess with intent to distribute five kilograms or more of cocaine (Count II); and possession with intent to distribute 500 grams or more of cocaine, (Count III) (CR-DE 27).

Co-defendant Joel Perkins pled guilty to Count I pursuant to a plea agreement wit the United States (CR-DE 56). Movant elected to go to trial. After a jury trial, she was convicted of Counts I and II and acquitted of Count III. The jury found that she had conspired to import and to posses at least 15 kilograms but less than 50 kilograms of cocaine. Movant's motion for judgment of acquittal at the close of the government's case and her post-trial renewed motions for judgment of acquittal, and for a new trial were denied. The Court sentenced Movant

to two concurrent terms of 210 month of imprisonment followed by concurrent five-year terms of supervised release, and a special assessment of $200 (CR-DE 98).

The Eleventh Circuit Court of Appeals affirmed Movant's conviction and sentence in an unpublished decision. On February 20, 2007, the Supreme Court denied certiorari review. *Perkins vs United States*, 127 S.CT. 1344 (2077). On April 18, 2007, Movant timely filed this Motion to vacate.

Movant seeks relief based on the following grounds as described in her Motion to Vacate:

1. "Recordings made in "furtherance of the conspiracy" did not provide sufficient indicia of reliability and accuracy to be admissible at trial. Due process violation and Sixth Amendment right to confront and cross-examine adverse

witnesses....New discovery material was not available at defendant's trial;"

2. "The district court erred ... when admitting "jailhouse recording," claiming breach of consent, Title III and Bruton";
3. "The district erred, violating defendant's Sixth Amendment rights for gun enhancement to be decided by a jury beyond a reasonable doubt: and Right to confront;"
4. "Insufficient evidence; dismiss the indictment."

GROUNDS 2, 3, AND 4

The claim set forth in Grounds 2, 3, and 4 of the Motion to Vacate were addressed and rejected by the Eleventh Circuit on appeal. Consequently, they may not be reconsidered here. *Mills vs. United States,* 36 F.3d 1052, 1056 (11th Cir. 1994), cert.

denied, 115 S.Ct. 1966(1995); *United States v. Hobson,* 825 F.2d 364, 366 (11th Cir 1987), *cert. granted and judgment vacated on other grounds,* 492 U.S. 913 (1989); *United States v. Kalish,* 780 F.2d 506, 508 (5th Cir.), *cert. denied,* 476 U.S. 1118 (1986); and *United States v. Rowan, 663 F.2d 1034, 1035 (11th Cir. 1981). See also, Withrow v. Williams,* 507 U.S. 680, 7210-721 (1993) ("[F]ederal courts have found uniformly held that, absent countervailing considerations, district courts may refuse to reach the merits of a constitutional claim previously raised and rejected on direct appeal.... Thus, prior opportunity for full and fair litigation is normally dispositive of a federal prisoner's habeas claim.").

With respect to ground 2 claiming that the district court erred when admitting "jailhouse recordings," claiming breach of consent, Title III and Bruton, Movant apparently contends that is is not

procedurally barred. In essence, Movant contends that the Eleventh Circuit did not address the issue because her appellate counsel left out one specific substantive argument in support of the claim. It is not clear how appellate counsel failed to raise any additional, viable arguments in this regard.

On direct appeal, Movant claimed that the Court erred by allowing seven tapes of her jailhouse conversations with co-conspirator Marvin Johnson to be played. The eleventh Circuit resolved the issue as follows:

> Perkins does not explain how or why these evidentiary decisions were prejudicial or improper. *In Davis v. Hill Engineering, Inc.*, 549 F.2d 314, 324 (5th Cir. 1977), *overruled on other grounds, Gautreaux v Scurlock Mrine, Inc.*, 107 F.3d 331, 339 (5th Cir. 1997), our predecessor held that, where an appellant did

not specify on appeal how a district court's decisions was in error, the Court had no basis on which to consider the appeal. *Davis,* 549 F.2d at 324. In the instant case, Leslie Perkins argues that "[t][sheer] volume of these conversations improperly became the focus of the trial and prejudice overcame any possible probative value," but she gives no explanation as to what was on the tapes, why it was improper for them to become the focus of the trial or how they were prejudicial. With no substantive arguments to consider on these points, we do not address them.

(CR-DE 139, P. 13-14).

In an effort to resurrect this argument in this collateral proceedings, Movant makes a "substantive argument" that she claims appellate counsel allegedly should have made, but failed to make on

appeal. In any event, the substantives argument is, and would have been found on appeal, without merit. Moreover, there is a further procedural bar to the claim.

Movant's argument can be summarized as follows: Movant acknowledged she signed a consent to use the telephone at the Federal Detention Center in Miami. The consent form informed her that phone calls were monitored and recorded for the purpose of the security of the institution and to protect the public. She further acknowledges she had no expectation of privacy when in custody of the Bureau of Prisons, and that the calls were not illegally recorded or improperly disclosed to the Government. Nevertheless, Movant argues that the recorded conversations were improperly used at her trial where there was no probable cause to believe that she was furthering the conspiracy through the calls,

or that she was involved in a new crimes, or threatening the security of the institution. Movant sates that she would not have signed the consent if she had known that the recordings could be used against her in court when she had not violated the stated purpose of the consent; in other words, to protect the security of the institution and to protect the public. Movant contends that the government "used the prison security as a guise for what was essentially an effort to gain incriminating evidence for use against defendant in trial."

Because Movant did not raise this issue previously on the same basis that is alleged here, either in the district court or on direct appeal, she is barred from raising it in this proceeding, unless she can show cause excusing her failure to raise the issue previously and actual prejudice resulting from the alleged error, or a fundamental miscarriage of

justice. *Holladay v. Haley,* 209 F,3d 1243, 1254 (11th Cir. 2000); *United States v. Nyhuis,* 211 F.3d 1340, 1344 (11th Cir. 2000).

Movant claims that counsel was deficient on appeal for failing to raise the claim on the basis she is alleging here. Although ineffective assistance of counsel may satisfy the cause exception to a procedural bar, it will do so only if a review of the claim Movant complains counsel failed to raise was significant enough to have effected the outcome of the case. *Holladay v. Haley,* 209 F.3d at 1254; *United States v. Nyhuis,* 211 F.3d at 1344. Counsel's conduct, of course, is measured under the two-pronged test set out by the Supreme Court in *Strickland vs. Washington,* 466 U.S. 668 (1984, which instructs that a defendant must demonstrate both that (1) counsel's performance was deficient or unreasonable under prevailing professional norms;

and (2) counsel's deficient performance prejudiced the defense, producing a result which is unreliable. *Id.* At 687-688, 94, 697. Movant's has not established that counsel was either constitutionally deficient or that she was prejudiced by any alleged deficiency.

Movant provides no legal basis, and the Court is unaware of any legal basis for her argument tht the admission of the recorded conversations violated any recognizable constitutional right. Movant merely recites the phrases "breach of consent, Title III, and Bruton" in the heading of this argument as the legal basis for relief. In addition to Movant's deficiencies in articulating this particular argument, as a matter of law, the law is clear her rights were not violated by use of the recordings. The telephones were legally obtained and their introduction at trial did not implicate any "Bruton" or Confrontation Clause rights.

Because Movant's argument in support of Ground 2 lacks legal support, her appellate counsel was not effective for failing to pursue this claim. Accordingly, Ground 2 is rejected.

GROUND 1

Movant claims that the recordings made "in furtherance of the conspiracy" did not provide sufficient indicia of reliability and accuracy to be admissible at trial, causing a due process violation and violation of her Sixth Amendment right to confront and cross-examine adverse witnesses. However, Movant makes no cogent or persuasive argument in respect to those contentions. Rather, Movant argues this claim as a newly discovered evidence contention. This is particularly evident from her discussion in the motion to Reply Memorandum. In support of Ground 1, Movant claims that co-defendant, husband, Joel Perkins

made a statement after her trial in which he admitted that he had made false statements to the undercover agent about his drug dealing experience during the course of the conspiracy to create the belief that he had and Movant had been involved in large drug deals and that they had sufficient funds to pay for the drugs when in fact they did not.

Movant did not raise this claim previously, either in this Court or on direct appeal. Consequently, unless Movant can establish cause excusing her failure to raise the issue previously and actual prejudice resulting form the alleged error, or a fundamental miscarriage of justice, the issue is procedurally barred. Movant explains that the issue was not previously presented because she did not have this information at the time of her trial. Movant thus casts this claim as a newly discovered evidence claim. In this regard, she has not carried

her burden to show a basis for relief under this theory or to overcome her procedural default.

In addressing a newly discovered evidence claim in the §2255 context, the Eleventh Circuit has held:

> This court has concluded that §2255 motions based on new evidence are subject to the standards generally applicable to motions for a new trial based on new evidence [citations omitted] There are now five requirements that a movant must satisfy before a new trial will be granted based on newly discovered evidence. *United States v. Jernigan,* 341 F.3d 1273, 127 (11th Cir. 2003). The five requirements are as follows:
>
> > (1) the evidence was discovered after trial, (2) the failure of the defendant to discover the evidence was not due

to a lack of diligence, (3) the evidence is not merely cumulative or impeaching, (4) the evidence is material to issues before the court, and (5) the evidence is such that a new trial would probably produce a different result. Id. (Citations omitted) Furthermore, "we have held that motions for a new trial are highly disfavored, and that district courts should use great caution in granting a new trial motion based on newly discovered evidence." Id. (Internal quotation marks and citations omitted). [The movant] would have to satisfy these five requirements to obtain a new trial based on new evidence if the issue

> was reaised on direct appeal. The standard is arguably higher, but certainly no lower, for [movant] to obtain a new trial based on new evidence through a §2255 proceeding.

Lynn v. United States, 365 F.3d 1225, 1237 (11th Cir. 2004).

Based on this standard, Movants's claim is deficient in several respects. The alleged statement by Movant's co-defendant Joel Perkins is not new evidence, is not material and is not evidence which would probably produce a different result in a new trial. Movant does not establish that her husband's statement to the undiscovered agent was not discoverable by the exercise of due diligence. Even if she had, the alleged misrepresentation constituted at most, mere puffing by Joel Perkins to establish his

credibility as an experienced and capable drug dealer to bolster his chance of convincing his intended co-conspirator to do business with him. Joel Perkins' statement is not material and does not undermine the evidence upon which the jury found Movant guilty. The Court finds that even if Movant had been able to introduce Joel Perkins' statement into evidence at trial and she was able to argue the substance of the statement to the jury, together with showing that sham cocaine, rather than actual cocaine, was used, there is no reasonable probability that the outcome of the trial would have been different or that the recordings would have been ruled inadmissible as unreliable. Accordingly, the Court concludes that Movant's argument 1, including it's "newly discovered evidence" characterization is unpersuasive. Such evidence, even if truly newly discovered evidence, is insufficient t satisfy the

standard for reviewing "newly discovered evidence" claims in a §2255 proceeding. At best it merely reinforces the suggestion that Joel Perkins, and presumably his wife, Movant, were anxious to enter into the drug deal. This ground is denied.

CONCLUSION

For the foregoing reasons, Movant's Motion to Vacate, Set Aside or Correct Sentence pursuant to Title 28, U.S.C., Section 2255 is DENIED. All other pending motions are denied as moot and the Clerk shall close this filed.

DONE AND ORDERED in Chambers this 12th day of June 2007.

"s/"

PAUL C. HUCK
U.S. DISTRICT COURT JUDGE

Copies furnished to:
All Counsel of record.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 07-CV-60559

LESLIE PERKINS,
Movant

Vs.

UNITED STATES OF AMERICA,
Respondent
_____/

ORDER DENYING MOTION FOR

RECONSIDERATION AND

CERTIFICATE OF APPEALABILITY

THIS CAUSE is before the Court upon Movant's Motion of Reconsideration, or in the Alternate, Grant Certificate of Appealability [D.E. #16], filed on July 27, 2007. Reconsideration is an extraordinary remedy reserved for three circumstances: "1) an intervening change in controlling law; 2) the availability of new evidence; and 3) the need to correct clear error or prevent

manifest injustice." *Williams v. Cruise Ships Catering & Service Int'l, N.V.,* 320 F Sup. 2d 1347, 1357-58 (S.D. Fla. 2004); *Reyher v Equitable Life Assur. Soc.,* 900 F.Supp. 428, 430 (M.D. Fla. 1995). A motion for reconsideration is not intended to be a tool for relitigating what a court has already decided. *Reyher,* 900 F.Supp. at 430. Rather, it "must demonstrate why the court should reconsider its prior decision and set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision." *Id.* (internal quotations omitted). Because Movant filed the instant case *pro se,* the Motion must be "liberally construed" and "held to less stringent standards than [motions] drafted by lawyers." *Erickson v Pardus,* 127 S.Ct. 2197, 2200 (2007) (quoting *Estelle v. Gamble,* 429 U.S. 97 (1976).

Movant bases his Motion on four grounds. None of the limited circumstances that justify reconsideration apply in this case. Movant has presented neither an intervening change in controlling law, nor new evidence, nor the need to correct clear error or prevent manifest injustice.

In the alternative, Movant requests that the Court issue a Certificate of Appealability Pursuant to 28 U.S.C. §2253(c) an appeal may not be taken from a final order in a habeas corpus proceeding unless a Certificate of Appealability is issued. The certificate must contain a finding that the applicant has made a substantial showing of the denial or a constitutional right and must indicate which specific issue or issues satisfy the required showing. Applying these standards, the Court finds that there is no substantial showing of a denial of a constitutional right. Accordingly, it is hereby

ORDERED that Movant's Motion of Reconsideration, or in the Alternate, Grant Certificate of Appealability is DENIED.

DONE AND ORDERED in Chambers this 31st day of July 2007.

"s/"

PAUL C. HUCK
U.S. DISTRICT COURT JUDGE

Copies furnished to
All counsel of record

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 05-15810
Non-Argument Calendar

D.C. DOCKET No. 05-60106-CR-WPD

FILED

US COURT OF APPEALS
ELEVENTH CIRCUIT

October 26, 2006

THOMAS K. KAHN
CLERK

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

Versus

LESLIE PERKINS,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

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APPENDIX C [1]

(October 26, 2006)

Before TJOFLAT, BARKETT and HULL, Circuit Judges.

PER CURIAM:

Leslie Perkins appeals her convictions and 210-month sentences for conspiracy to import cocaine, in violation of 21 U.S.C. § 963, and conspiracy to possess with the intent to distribute cocaine, in violation of 21 U.S.C. §846. She challenges both her conviction and her sentence on multiple grounds. Having considered her arguments in light of the law and the record, we affirm.

I. Sufficiency of the Evidence

Perkins argues that the evidence was insufficient to support a conviction on the conspiracy counts. First, she contends that if there was any agreement, it was an agreement to smuggle a person, rather than drugs, into the United States. She also argues

that her mere knowledge that others in the Bahamas had cocaine was insufficient to show her active participation in an agreement to import. Finally, she argues that there was no conspiracy because the purported "cocaine" with which she was found upon her arrest was actually fake.

We review de novo challenges to the sufficiency of the evidence, viewing the evidence in the light most favorable to the government. United states v. Futrell, 209 F.3d 1286, 1288 (11th Cir. 2000). To support a conviction for conspiracy to import cocaine, "the government must prove beyond a reasonable doubt that there existed an agreement between two or more persons to import narcotics into the United States and that the defendant knowingly and voluntarily participated in that agreement." United States v. Arbane, 446 F.3d 1223, 1228 (11th Cir. 2006).

In the instant case, DEA Agent Randy Matschner testified at trial that the investigation of Leslie Perkins and her husband, Joel Perkins, began when he was advised that Joel Perkins was looking for a boat to import cocaine from Freeport to the United States.

Agent Matschner testified that he contacted Joel Perkins and they arranged a deal for March 2005 whereby Matschner would pick 20 kilos of cocaine up from Joel Perkins and do a "turn around trip"[1] to pick up another 40 kilos. Subsequently, Matschner met with both Leslie and Joel Perkins in Deerfield Beach, Florida and testified that Leslie Perkins participated in the conversation regarding

[1] Matschner stated that a "turn around" was a return trip, for more cocaine, immediately after unloading the first shipment.

the planned trip to pick up the cocaine, ultimately suggesting that she would be on the boat when Matschner met it to transfer the cocaine. Matschner testified that Joel and Leslie Perkins again later contacted him by three-way telephone call to discuss Leslie Perkins boarding the vessel in the Bahamas and return to the United States with the cocaine. Agent Matschner testified that he advised her to pack the cocaine in 20 kilo amounts, packaged on ice and hidden from view by frozen seafood.

Agent Matschner, along with other agents, proceeded to leave Fort Lauderdale, Florida for the Bahamas. According to Matschner, Joel Perkins contacted him, via cell phone, while he was on the boat and told the Agent that Leslie Perkins was waiting for him in the Bahamas. Matschner then made telephonic contact with Leslie Perkins and gave her the coordinates of his boat's location.

Matschner stated that Leslie Perkins told him she would be arriving to meet his ship in a small white Boston Whaler.

According to Matschner, when he saw the Boston Whaler approaching he observed three persons on board the boat: (1) Marvin Johnson, the supplier of the drugs, (2) Leslie Perkins, and (3) an unidentified Bahamian male. Matschner testified that both Johnson and the other man had pistols tucked into their waistbands. Matschner stated that, as the Boston Whaler was alongside the undercover boat, he asked Leslie Perkins if the dope was in the cooler, and Leslie Perkins responded "yes." Matschner testified that after he helped Leslie Perkins onto the boat, Johnson handed him the cooler. Matschner asked Johnson if the dope was in the cooler, and Johnson responded in the affirmative.[2]

[2]Agent Coddington corroborated Agent Matchner's testimony. Agent Coddington testified that he was on board the undercover vessel for security purposes, concealed in the cabin area of the boat. According to Coddington, he observed a small boat approach their boat, containing two black males and Leslie Perkins. Coddington stated that he observed pistols in the waistbands of the two men. Coddington testified that Matschner led Leslie Perkins into the cabin, and Coddington detained her.

At that point, Leslie Perkins was placed in custody. According to Matschner, when he opened the cooler, it was packed the way he had advised Leslie Perkins to pack it, with ice and 20-kilo packages, except that there was no fish or lobster.

When Matschner submitted the packages for analysis by the DEA lab, the analysis revealed that the cocaine was fake and that the packages he retrieved contained no controlled substance. A search of Leslie and Joel Perkins's home, however, revealed cocaine. Agent Coddington, who led the search of the home, testified that, in the master

bedroom of the Perkins home, he found a shoe box containing a large amount of U.S. currency and a kilo-sized cocaine brick. Coddington testified that the cocaine brick was tested and was a high quality of cocaine. Coddington testified that a green backpack found in the house contained fake dope and a large digital scale was also found in the backpack. Coddington testified that the agents conducting the search of the Perkins home also found a gray safe in the master closet which contained money and a a Ziploc bag containing 427.8 grams of cocaine.

Based on the above, we conclude that sufficient evidence was presented from which a jury could have found that Leslie Perkins was part of the conspiracy to import cocaine. Furthermore, the fact that the cocaine loaded onto the undercover boat was fake is not inconsistent with the conclusion that the evidence was sufficient to support a conspiracy

conviction. Although our predecessor Court, in United States v. Murray, 527 F.2d 401 (5th Cir. 1976), reversed a conviction where the defendant sold fake dope, that case is inapplicable here. In Murray, the defendant not only sold fake dope, but his actions were consistent with someone who intended only to sell a fake substance. Murray, 527 F.2d at 409. In this case there was sufficient evidence by which the jury could have inferred tht the conspirators' behavior was consistent with an intention to import an actual illegal substance. For example, there was much discussion about a turn around trip, on which Matschner would pick up 40 kilograms of cocaine, and the jury could have reasonably inferred that the first trip was intended as a test run. Furthermore, the jury could infer that the conspirators' behavior was inconsistent with an intention only to import a fake substance. Actual

money was exchanged, and, since the drugs belonged to Johnson, the conspirators had nothing to gain from importing a fake substance. Additionally, there was no evidence that Leslie Perkins knew that the cocaine was fake, and the jury could infer that she did know. In a recorded jailhouse telephone conversations between Leslie Perkins and Johnson, Johnson referred to ***his*** decision to put fake drugs on the boat. In this way, the jury reasonably could interpret the facts of this case to be distinguishable from those in Murray. Thus, "a reasonable trier of fact, choosing amount reasonable interpretations of the evidence, could find guilt beyond a reasonable doubt." United States v. Baker, 432 F.3d 1189, 1231 (11th Cir. 2005).

II. Evidentiary Issues

Perkins argues that the aggregation of alleged errors in the district court's evidentiary rulings

mandates a new trial.[3] Perkins first argues that she was prejudiced by the playing of the tape of a jailhouse telephone conversation with Johnson, an alleged co-conspirator, in which she made reference to her decision to remain silent and not talk to law enforcement. She argues that the district court failed to properly instruct the Jury regarding her right to remain silent. See Doyle v Ohio, 426 U.S. 610, 619 (1976) ("[I]t would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.").

[3]We review a district court's evidentiary rulings for an abuse of discretion:

[3]An abuse of discretion arises when the district court's decision rests upon a clearly erroneous finding of fact, an errant conclusion of law, or an improper application

> of law to fact. We review preserved evidentiary objections for harless error. However, when a party raises a claim of evidentiary error for the first time on appeal, we review it for plain error only. Under the plain error standard, before an appellate court can correct an error not raised at trial, there must be (1) error, (2) that is plain, and (3) that affects substantial rights. If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or pubic reputation of judicial proceedings. Further, we must review the prejudicial effect of all evidentiary errors, evaluated under both preserved and plain error standards, in the aggregate. We will therefore reverse if the cumulative effect of the errors in prejudicial, even if the prejudice caused by each individual error was harmless.

Baker, 432 F.3d at 1202-03 (internal citations omitted).

In United States v. Miller, 255 F.3d 1282, 1285-86 (11th Cir. 2001), we held that:

> [a] [Doyle] violation is harmless if the error had no substantial and injurious effect or influence in determining the jury's verdict.

> For example, we have repeatedly held harmless a prosecutor's single reference to the defendant's post-miranda silence if it occurs during a trial at which the government's evidence was otherwise overwhelming. This is especially so where the prosecutor makes no further attempt to 'highlight' the defendant's exercise of Miranda rights either in questioning other witnesses or during closing argument.

Miller, 255 F.3d at 1285-86 (internal citations and quotation marks omitted).

In the instant case, not only were the references to Perkins's silence not highlighted, but in addition, the district court gave a curative instruction and redacted the references from the transcript before sending it to the jury room. Under these circumstances, we cannot say that any error

had a "substantial and injurious effect or influence in determining the jury's verdict," and thus, any error was harmless. Id.

Perkins next argues that she was prejudiced by Agent Matschner's "blurting his improper comments and opinions about" Leslie Perkins being in the Bahamas, having contacts in the Bahamas, and calling telephone numbers in the Bahamas. She argues that the jury was left with the conclusion that the agents had information not available to the jury, giving improper weight to the government's case. She argues that the district court erred in admitting evidence of her trips and telephone calls to the Bahamas the year prior to her arrest.

Perkins concedes on appeal that her objections to the challenged "improper" testimony were sustained. Furthermore, evidence of Leslie Perkin's frequent travel t the Bahamas during the course of

the investigation, together with telephone records showing contact between her phone and those of Joel Perkins and Johnson, while perhaps not proof of participation in the conspiracy, are consistent with and probative of such participation.[4] The purpose of some or all of Leslie Perkins's travel to the Bahamas may in fact have been innocuous. However, the government was required to show that Leslie Perkins had contact with the drug sources in the Bahamas, including Johnson, and the jury could interpret this evidence as probative of that fact.

[4]As we have explained:

> Evidence is relevant if it has 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.' Fed.R.Evid. 401. In a criminal trial, issues of consequence generally consist of 'the elements of the

> offenses charged and the relevant defenses (if any) raised to defeat criminal liability.' United States v. Hall, 653 F.2d 1002, 1005 (5th Cir. 1981). '[R]elevant evidence is admissible,' but 'may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.' Fed.R.Evid. 402 and 403.

United States v. Williams, 51 F.3d 1004, 1010 (11th Cir. 1995), abrogated on other grounds, Jones v U.S., 526 U.S. 227, 231-32 (1999).

Perkins next argues that she was prejudiced by Agent Coddington referring to her and Joel Perkins's family home as "her" home and the bedroom as "her" bedroom. Perkins concedes that all timely objections to such references were sustained, but again argues that the jury was left with the conclusion that the agents had information not available to the jury, giving improper weight to the government's case. Agent Matschner testified,

without objections, that: (1) Leslie Perkins gave him her address: 3705 Northwest 82nd Ave Coral Springs, Florida; (2) the residence was in fact that of Leslie Perkins; (3) he had discovered that Joel Perkins lived at that same address; (4) a search warrant was obtained for the Perkins residence; and (5) that the warrant was executed on March 7 with Agent Ron Coddington the primary agent in charge. Agent Coddington testified, without objection, that the search warrant was executed in the house at 3705 Northwest 82nd Ave., Coral Springs, Florida. It was not prejudicial to refer to the house as Leslie Perkins's house, and the bedroom in the house as Leslie Perkins's bedroom, when it was properly established that the house belonged to her and her husband.

Perkins next argues that her objection was erroneously overruled as to Agent Matschner's

statement that his life might be in danger, which was why he gave Perkins a fake address. He testified that a false address was necessary "so nobody's life would be in jeopardy." We see no prejudice resulting from the admission of this statement, as the jury could reasonably infer that the use of a real address, in an undercover operation, as a general rule and without any specific reference to the individuals in the instant case, poses an unreasonable risk. The jury could similarly infer that the use of a fake address in such operations is prudent, again, with no necessary reflection on the individuals in the instant case. We do not find reversible error.

Finally, Perkins argues that the district court erred by allowing seven tapes of her jailhouse conversations with Johnson to be played, and erred further by allowing the transcripts to be taken to the

jury room. She contends that a government chart outlining her telephone calls was improperly admitted and allowed in the jury room during deliberations. Perkins does not explain how or why these evidentiary decisions were prejudicial or improper. In Davis v. Hill Engineering, Inc., 549 F.2d 314, 324 (5th Cir. 1977), overruled on other grounds, Gautreaux v. Scurlock Marine. Inc., 107 F.3d 331, 339 (5th Cir. 1977), our predecessor held that, where an appellant did not specify on appeal how a district court's decision was in error, the Court had no basis on which to consider the appeal. Davis, 549 F.2d at 324. In the instant case, Leslie Perkins argues that "[t]he [sheer] volume of these conversations improperly became the focus of the trial and prejudice overcame any possible probative value," but she gives no explanation as to what was on the tapes, why it ws improper for them to become

the focus of the trial, or how they were prejudicial. With no substantive arguments to consider on these points, we do not address them.

III. Prosecutorial Misconduct

Perkins argues that the prosecutor engaged in misconduct by: (1) attempting to exclude minority jurors, (2) engaging in a variety of personal attacks during the trial, (3) failing to redact a tape, and (4) failing to call Joel Perkins as a witness after suggesting that it would. In assessing claims of prosecutorial misconduct, we apply a two part test:

> the challenged statements must be improper, and must have prejudicially affected the defendant's substantial rights. A defendant's substantial rights are prejudicially affected when a reasonable probability arises that, but for the remarks, the outcome would be different. Claims of prosecutorial misconduct

are fact specific inquiries which must be conducted against the backdrop of the entire record.

United States v. Hall, 47 F.3d 1091, 1098 (11th Cir. 1995).

With respect to jury selection, Perkins argues that the prosecutor engaged in misconduct by striking black jurors. However, Perkins doe not cite Batson v. Kentucky, 476 U.S. 79 (1986), or any other case to support her argument. Further, she gives no indication, and the transcript of jury selection gives no indication, of how many blacks were in the venire, how many, if any, went unchallenged by the prosecutor, and how many were ultimately allowed on the jury. When a defendant fails to offer argument on an issue, it is abandoned. United States v. Cunningham, 1161 F.3d 1343, 1344 (11th Cir. 1998). In the absence of supporting facts,

together with the absence of any law, her argument about jury selection must fail.

Perkins's second assertion of prosecutorial misconduct regards alleged personal attacks and criticism of defense counsel made by the prosecutor during trial. Perkins contends that the prosecutor improperly: (1) referred to Perkins as a "drug dealer" when addressing the jury; (2) implied that there was information from Brian, the informant who first supplied Agent Matschner with the tip about Joel Perkins; (3) implied additional information by asking witnesses to explain or give opinions about tape recordings; and (4) gave her personal opinion on the validity of the defense presented by stating that "she never heard of a withdrawal defense after a subject was arrested." Perkins argues that the prosecutor's references to her as a "drug dealer" in her opening statement and closing argument were improper

under our precedent in United States v Blakey, 14 F.3d 1557, 1560 (11th Cir. 1994). That case involved a statement that went outside the evidence and that the government conceded at trial was not true. Blakey, 14 F.3d at 1560. In the instant case, the prosecutor's statement was consistent with the evidence. Furthermore, given the volume of evidence against her, Perkins has not shown that there is a reasonable probability that, but for the challenged conduct of the prosecutor, the outcome of the trial would have been different. See Hall, 47 F.3d at 1098.

Third, Perkins argues that the prosecutor failed to properly redact the tape that included Leslie Perkins's references to remaining silent and commented on Leslie Perkins's silence. She argues that the prosecutor commented during closing argument that "the jury did not hear the Appellant

deny possession or ownership of drugs." As discussed above, the failure to redat the tape of the jailhouse conversation was harmless error because it "had no substantial and injurious effect, or influence I determining the jury's verdict." See Miller, 255 F.3d at 1285-86. Thus, it similarly did not result in a reasonable probability that, but for the challenged conduct of the prosecutor, the outcome of the trial would have been different. See Hall, 47 F.3d at 1098. As for the reference to Perkins's failure to deny possession of drugs, this was a reference to a conversation with Johnson. Thus, Perkins's silence was not with respect to the court or to law enforcement, but with respect to her own co-conspirator. Thus, the reference was not erroneous.

Finally, Perkins argues that the government improperly advised the court and the defense that it would call Joel Perkins as a witness, and then did

not do so, after it had forced the defense to address before the jury the fact that Joel Perkins had pled guilty and was cooperating with the government. Leslie Perkins has failed to show how her being forced to address before the jury the fact that Joel Perkins had pled guilty and was cooperating with the government created a reasonable probability that, but for the challenged conduct of the prosecutor, the outcome of the trial would have been different. See Hall, 47 F.3d at 1098. For these reasons, we find no evidence of prejudicial prosecutorial misconduct.

IV. Denial of Motion for New Trial

Perkins argues that the verdict was against the weight of the evidence and thus the district court erred in denying her motion for a new trial. We review a district court's denial of a motion for a new trial for abuse of discretion. United States v. Riley, 211 F.3d 1207, 1208 vacated on other grounds, 232

F.3d 844 (11th Cir. 2000). In reviewing a motion for a new trial based on a claim that the verdict is against the great weight of the evidence:

> [i]f the court concludes that, despite the abstract sufficiency of the evidence to sustain the verdict, the evidence preponderates sufficiently heavily against the verdict that a serious miscarriage of justice may have occurred, it may set aside the verdict, grant a new trial, and submit the issues for determination by another jury.

United States v. Martinez 763 F.2d 1297, 1312 (11th Cir. 1985) (internal citations and quotation marks omitted).

As discussed above, many of the errors alleged by Leslie Perkins were not errors. Taking Perkins's claims together with the weight of the evidence arguments discussed above, and weighing them

against the strength of the government's case, the cumulative effect does not result in a miscarriage of justice, and the district court did not abuse its discretion by denying the motion for a new trial.

V. Sentencing

Perkins argues that the district court committed two errors in sentencing. First, she contends that the court erred by enhancing her sentence for the presence of Johnson's gun. She argues that the absence of jury finding on this issue violates United States v Booker, 543 U.S. 220, 244 (205), and that the enhancement was not properly applied nor factually supported. Second, she argues that the district court clearly erred in finding that no reduction was appropriate for her role in the offense.

"Because [Leslie Perkins] objected to the enhancements to [her] sentence in the district court, we review the sentence [de novo]. We will reverse

the district court only if any error was harmful." United States v. Paz, 405 F.3d 946, 948 (11th Cir. 2005) (internal citations omitted).

With respect to the lack of jury findings as to the firearm enhancement, we find no error. If the district court applies the Guidelines as advisory, nothing in Booker prohibits it from making, under a preponderance-of-the-evidence standard, additional factual findings that go beyond a defendant's admission. United States v Chau, 426 F.3d 1318, 1323-24 (11th Cir. 2005); United States v. Crawford, 407 F.3d 1174, 1178-79 (11th Cir. 2005). Perkins's constitutional Booker argument thus fails because the district court applied the Guidelines as advisory and ws thus permitted to make additional factual findings by a preponderance of the evidence. Chau, 426 F.3d at 1323-24.

With respect to the proper applications of the firearm enhancement, §2D1.1(b)(1) of the United States Sentencing Guidelines provides that, with respect to the instant offense conduct involved in Count 1, conspiracy to import cocaine, "[i]f a dangerous weapon (including a firearm) was possessed," the base offense level is increased by two. U.S.S.G. §2D1.1(b)(1). We have held that:

> For a §2D1.1(b)(1) firearms enhancement for a co-conspirator possession to be applied to a convicted defendant, the government must prove by a preponderance of the evidence: (1) the possessor of the firearm was a co-conspirator, (2) the possession was in furtherance of the conspiracy, (3) the defendant was a member of the conspiracy at the time of the possession, and (4) the co-conspirator possession was reasonably foreseeable by the defendant.

United States v. Gallo, 195 F.3d 1278, 1284 (11th Cir. 1999).

In the instant case, Agents Matschner and Coddington both testified that Johnson had a gun at the time of the boat-to-boat transfer. Based on the evidence of Johnson being the source of the drugs and the discussions between Agent Matschner, Joel Perkins, Leslie Perkins, and Johnson, the evidence supports this finding that Johnson was a co-conspirator in the conspiracy to import cocaine. Johnson's possession of the gun at the time of the transfer of the cocaine was thus in furtherance of the conspiracy. Because Leslie Perkins fulfilled her role in the conspiracy by boarding the undercover boat for the purpose of being responsible for the drugs, the evidence indicates that she was a member of the conspiracy at the time of Johnson's possession. Finally, because there is a "frequent and

overpowering connection between the use of firearms and narcotics traffic," United States v. Cruz, 805 F.2d 1464, 1474 (11th Cir. 1986), and because Leslie Perkins was on the Boston Whaler with Johnson at the time Matschner testified that he saw the gun, the evidence indicates that it was reasonably foreseeable to Perkins that Johnson possessed a gun in furtherance of the conspiracy. Accordingly, the district court did not clearly err in finding, by a preponderance of the evidence, that all four Gallo prongs were met, and thus did not err in applying the two-level enhancement for the presence of Johnson's gun.

Perkins' second argument about sentencing is her conclusory statement that the district court's factual finding that no reduction was warranted "was not substantiated and in fact constituted clear error." Perkins offers no support and explains no argument

in support of this conclusion, thus we need not address it. See Cunningham, 161 F.3d at 1344 (holding that, when a defendant fails to offer argument on an issue, it is abandoned).

Upon review of the pleadings, the sentencing transcript, and upon consideration of the briefs of the parties, we find no reversible error.

AFFIRMED.

MICHAEL D. GELETY
Attorney At Law
1209 S. E. Third Avenue
Fort Lauderdale, Florida 33316

Telephone (954) 462-4600
Facsimile (954) 462-0828

November 16, 2006

Leslie Renae Perkins
Reg. No. 57160-004/F4
FCC Coleman Camp
P.O. Box 1027
Coleman, FL 33521-1027

ATTORNEY/CLIENT CORRESPONDENCE

Re: United States v. Perkins, 11th Circuit
Case No.: 05-15810-C
Petition to the U.S. Supreme Court

Dear Leslie:

I hope this letter finds you as well as possible.

Enclosed you will find a copy of our motion in the United States Supreme Court to proceed *in forma pauperis* together with the required affidavit in support of tht motion. Please review these documents, fill them out appropriately and if

EXHIBIT 1

everything is accurate and true, sign the affidavit, have it notarized sign the motion, and return the originals to me in the enclosed envelope, keeping the copies for your own file.

Having repeatedly reviewed the Opinion from the 11th Circuit Court of Appeals and after the follow-up research, I determined that it was clear and obvious that Motion for Rehearing to that same Court would be pointless and a waste of your valuable time. I immediately began to prepare and research the Petition to the United States Supreme Court, and this motion and affidavit are required as part of our Petition for Certiorari Review in the high court.

Also, Rene, I would like to approach the agents and the prosecutors regarding a possible substantial assistance effort or proffer o your behalf to try and

get a sentence reduction at this stage. When the case is resolved in the courts of appeals, and even pending the Supreme Court Ruling, trial court can reclaim jurisdiction for the purpose of a sentence reduction, particularly, if under Rule 35(b) there is a motion by the government claiming substantial assistance. It seems to me that there would be no harm in this and it could very well be a tremendous help to you. I have found through my experience that, once the case is tried and a sentence is imposed, and once all of the matters are resolved in the government's eyes, they take a much more reasonable view of the next steps in the case. The fact that Joel got such a disproportionate low sentence, the fact that Marvin and the other Bahamians were never even arrested or charged, the fact that you were acquitted on the charges dealing with house etc. and the fact that the Judge imposed

such a high sentence may open the door to some mercy or compassion on the part of the government—but we need to do something from our end also. I ask you to consider this road especially since the content of the "jailhouse" tape recordings told the government everything possible already. In other words, anything that you said during a substantial assistance proffer to the agents or to the prosecutor at this point essentially be "old news" but, they often need you take the affirmative step to show that you are trying to cooperate or give substantial assistance before they will consider the Motion to Reduce Sentence. By this, I mean, that anything that you tell them they already know so, in your conscience and as a practical matter, you wouldn't be hurting Marvin or the other Bahamians, or even Joel by giving the government any other details or accounts of the proceeding—but it could very well

help you if I can sweet talk the government into this deal. Carefully consider this and call me as soon as you can regarding this issue and any questions that you may have on the affidavit and motion or on the Petition to the Supreme Court in general. Keep a positive thought and will keep trying.

Sincerely,

"s/"

Michael D. Gelety

Enclosures: As stated

MDG/bjh

TELEPHONE (954) 462-4600

TELEFAX (954) 462-0828

MICHAEL D. GELETY

ATTORNEY AT LAW

1209 S. E. THIRD AVE

FORT LAUDERDALE, FLORIDA 33316

EXHIBIT 2

Date: 11/19/07

Time: 12:08 PM Location: COA

Federal Bureau of Prisons

TRUFONE

Telephone Account Statement

Sensitive But Unclassified

Start Date: 11/1/2006 12:00 AM

End Date: 11/30/2006 11:59 PM

Location: COA

Call Status: All

Account Status: All

Call Type: All

Register #: 57160004

Include Zero Cost Transactions: Yes

EXHIBIT 2 [2]

Date:	11/1/2006
Time:	1:50:40 pm
Number called:	(954) 462-4600
Rec Ch:	81
Minutes:	0
Amount:	0.00
Balance:	0.00
CC:	11
Facility:	COA

Date:	11/2/2006
Time:	12:22:23 PM
Number called:	(954) 462-4600
Rec Ch:	83
Minutes:	11
Amount:	(2.99)
Balance:	34.03
CC:	0
Facility:	COA

EXHIBIT 2

Date:	11/7/2006
Time:	1:06:05 PM
Number called:	(954) 462-4600
Rec Ch:	81
Minutes:	0
Amount:	0.00
Balance:	0.00
CC:	11
Facility:	COA

Date:	11/7/2006
Time:	4:33:11 PM
Number called:	(954) 462-4600
Rec Ch:	83
Minutes:	0
Amount:	0.00
Balance:	0.00
CC:	11
Facility:	COA

EXHIBIT 2 [4]

Date:	11/7/2006
Time:	4:40:47 PM
Number called:	(954) 462-4600
Rec Ch:	83
Minutes:	4
Amount:	(0.92)
Balance:	26.21
CC:	0
Facility:	COA

Date:	11/8/2006
Time:	3:23:27 PM
Number called:	(954) 462-4600
Rec Ch:	81
Minutes:	0
Amount:	0.00
Balance:	0.00
CC:	11
Facility:	COA

EXHIBIT 2

Date:	11/8/2006
Time:	3:24:10 PM
Number called:	(954) 462-4600
Rec Ch:	81
Minutes:	3
Amount:	(0.69)
Balance:	25.52
CC:	0
Facility:	COA

Date:	11/9/2006
Time:	3:31:51 PM
Number called:	(954) 462-4600
Rec Ch:	81
Minutes:	0
Amount:	0.00
Balance:	0.00
CC:	11
Facility:	COA

EXHIBIT 2

Date:	11/9/2006
Time:	3:32:31 PM
Number called:	(954) 462-4600
Rec Ch:	81
Minutes:	0
Amount:	0.00
Balance:	0.00
CC:	11
Facility:	COA

Date:	11/9/2006
Time:	3:33:16 PM
Number called:	(954) 462-4600
Rec Ch:	81
Minutes:	0
Amount:	0.00
Balance:	0.00
CC:	11
Facility:	COA

EXHIBIT 2 [7]

Date:	11/9/2006
Time:	3:34:09 PM
Number called:	(954) 462-4600
Rec Ch:	81
Minutes:	0
Amount:	0.00
Balance:	0.00
CC:	11
Facility:	COA

Date:	11/9/2006
Time:	3:34:55 PM
Number called:	(954) 462-4600
Rec Ch:	81
Minutes:	3
Amount:	(0.69)
Balance:	24.83
CC:	0
Facility:	COA

EXHIBIT 2

Date:	11/9/2006
Time:	4:32:39 PM
Number called:	(954) 462-4600
Rec Ch:	83
Minutes:	0
Amount:	0.00
Balance:	0.00
CC:	11
Facility:	COA

Date:	11/13/2006
Time:	4:40:49 PM
Number called:	(954) 462-4600
Rec Ch:	81
Minutes:	0
Amount:	0.00
Balance:	0.00
CC:	10
Facility:	COA

EXHIBIT 2

Date:	11/14/2006
Time:	9:42:45 AM
Number called:	(954) 462-4600
Rec Ch:	81
Minutes:	0
Amount:	0.00
Balance:	0.00
CC:	11
Facility:	COA

Date:	11/14/2006
Time:	1:29:41 PM
Number called:	(954) 462-4600
Rec Ch:	81
Minutes:	2
Amount:	(0.46)
Balance:	14.94
CC:	0
Facility:	COA

EXHIBIT 2 [10]

EXHIBIT 3 – REPRODUCED FROM HAND WRITTEN COPY

No spelling or content changes.
Only sentence ending periods

Hey, Cream's It's Wedensday. I just got done seeing you. I thank you for that. I was trying say to you that I feel so bad for you, us, me, your kid's, my kid's, our kid's, your

parent's and your family and your Sister & friend's. I feel like I took you away from them. I feel so sad in my heart. I was just about crying in the window. I was trying to tell you I wish we could hold each other. If only my arm's could reach through the window to get you. But it helped to see you and stare at you. It helped my mind but not my heart. It hurt's to bad. I feel like I let a lot of people down. So I sit here thanking you for just staying in the window to let me see you. I wish we were in different shoes. Your kids need you. They were better off w/us. I

wish they would let us out for a day. I would take them all to Chucke-Cheese and have a blast. I would have all of us take a picture on the Chucke-Cheese ride. I miss cooking for the boy's. I'm crying rt now. I'm looking away from my cellmate, but I don't care I miss making you breakfast in bed. I loved to due it for you. You are my princess and you alway's will be! Well I'm not in good shape rt now so I'm going to stop writing. I'll write you again tomarrow + the next day + the next day etc. I love you

Love Always

Joel Perkins

X 0 X 0

that a sentence in the range of 70 months is a disruption in your life, but it is not a life-altering sentence –ten years, twelve years, fifteen years – is life altering. At 70 months, you can get out while you're still a young person, you can still enjoy your family, your children, your friends, and your life. You understood, you thanked me for my diligence (and even after talking to your Dad), you rejected this 70 month offer. **You recall that I tried to assure you that Joel <u>was</u> going to testify against you, and he will verify and corroborate everything in the meetings and the tapes. I did not (and I do not) want you to make this decision to go to trial thinking that Joel will "save" you at the last minute, that he'll refuse to testify, or that he will protect you or minimize your role. He <u>can't</u> – once he pleads guilty, he <u>must</u> follow through or <u>he</u> will get the 151, 188 or 200-plus months in prison – and he's not going to**

take that sentence for you. Additionally, I reminded you that even if he tried to help you, the Government will has overwhelming evidence against you with the recordings, your position on the boat, etc., and I'm sure that Joel understands that — he's not going to take the big sentence and watch you get convicted and get an equally big sentence. That would make no sense. As usual, I ended our meeting reminding you that we can go to trial and win acquittals on the conspiracy cases (or at least get the jury to designate lesser amounts of drugs) but, because we lose the three level reduction for acceptance of responsibility, and lose the two level reduction for the safety valve, you can easily end up with a higher sentence after taking a tremendous risk. You again thanked me and rejected the 70 months.

As I was leaving, I again reminded you that this very desirable plea offer was totally without

your cooperation with the Government – you don't need to do a debriefing, you don't need give any information on anyone, it is a straight plea, which makes it even a better deal. Despite our many conversations regarding the possibility of your cooperation with the Government in order to get the possible 5K1 reduction of sentence (or a Rule 35 reduction after the sentence), you have been absolutely adamant that you would not cooperate and would not testify – even after I fashioned a deal that would allow you to cooperate on minor matters without testifying against relatives, family members or anyone of importance to you. NOTE: Once the recorded conversations from jail were reviewed and your strong position against cooperation came through in your conversations with Jesse (and your strong feelings against my efforts to set forth this option for you), I have stopped my efforts to convince

you in this matter – but this option is always open to you.

Unfortunately, as you pondered and, frankly, as you delayed, the trial date got closer and the Government was forced to start to transcribe their several ..

... with the Defense Discovery Disclosure that we had discussed. **You will recall that we went over potential witnesses and evidence to try to explain certain portions of the testimony and certain parts of your activity and behavior during the course of this conspiracy. It seemed that you still did not believe that your husband would testify against you at the trial and you brought me a few of his letters to you (as I had requested) while also mentioning that you**

spoke to him before court and he was still reassuring you. Frankly, Leslie, it was not until Joel and his lawyer finally stood up before the Court he plead guilty that you finally started to believe what I was telling you. This reality seemed to hit home with the Government went through their detailed facts of the case — facts which Joel acknowledged and facts which Joel will testify about at your trial, against you. As I had predicted, the Government did not make any specific recommendations for Joel's sentence having him plead "open", without any limitations until such time as he cooperated by testifying against you. Then, at the time of his sentencing, the Government will ask the Court to reduce the sentence because of his cooperation under 5K1. I remind you again that, had the Government given him a specific number, 70 months, 60 months, 40 months, etc. then we would be able to use that

number against him during cross examination making it appear to the jury that he was testifying only to get that designated sentence. The way it is set up now, he can legitimately say that he plead open, without a specific number of months, and that technically he is facing anywhere from the bottom end of 87 months to life in prison as the Judge warned him.

You will recall that after Joel did his plea, I immediately jumped up and walked over and talked a long time to the Prosecutor and to the agent "Randy" trying to get them to come back down to the 70 month deal and that conversation went on long enough for the Judge to finally agree to take a 15 minute break and let us talk to them and to let you make a decision. Of course, when the Judge came back about a half an hour later, you were still thinking and we were still discussing the matter and

you simply could not make a decision. You will remember that the Judge addressed you regarding your concern and your comfort level having me as your attorney and you assured him that there were no problems, we had no differences and that you were confident and comfortable with my representation. However, the decision wasn't getting made and the Prosecutor finally made a last minute offer to us which you will recall that I wrote down and read into the record so there would be no misunderstanding (an so there would be no chance for the Prosecutor to back out later): we would plead guilty to one count of Conspiracy (with the Government dismissing the other Conspiracy count and the Possession count, the Government would agree to the safety valve, taking us out of the mandatory minimum sentence and giving us a two level reduction), the ...

Sincerely,

"s/"

Michael D. Gelety, Esq.

MDG/omp

I, Leslie Renae Perkins have read this letter, I have gone over it with my attorney, Michael D. Gelety, I have asked him questions, he has answered questions and explained the circumstance and it is my decision to:

Take a plea offer in this case to minimize my exposure.

_____

LESLIE RENAE PERKINS

Or
It is my decision to go to trial in this matter.

"s/"

_____

LESLIE RANAE PERKINS

Dated this _____ day of July, 2005.

Exhibit 4

BP-3408.058 ACKNOWLEDGMENT OF INMATE

PART 3 & 4 CDFRM

May 94

U.S. Department of Justice

Federal Bureau of Prisons

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3. Monitoring of Inmate Telephone Calls

The Bureau of Prisons reserves the authority to monitor (this includes recording) conversations on any telephone located within its institutions, said **monitoring to be done to preserve the security and orderly management of the institution and to protect the public.** An inmate's use of institutional telephones constitutes consent to this monitoring. A properly placed phone call to an attorney is not monitored. You must contact your unit team to request an unmonitored attorney call.

EXHIBIT 5

I have read ~~or had read to me~~ (cross out one) the above notification on the monitoring of inmate telephone calls. I understand that telephone calls I make from institution telephones may be monitored and recorded.

Signature of Inmate – Leslie Perkins "s/" Date 3/7/05

I hereby certify that the above information was (cross out incorrect statements) (provided to the inmate to read) and / or was (~~read and fully explained by me to the above inmate~~). The inmate (signed) / (~~refused~~) to sign.

Printed name / Signature of Staff Member

H. Crespo "s/" Date 03/07/05

4. Notification in Case of Death / Illness, Disposition of Property

In the event I should die, I direct that my mom, whose name is Helen Johnson and whose

address is 3830 NW 8 Place, Plantation, FL 33311, 954 – 345-0909 be notified. "s/" (initialed & dated

In the event the Bureau of Prisons staff is unable to locate the above designated person, following a reasonable search, I authorize the substitution of the following person in his or her stead.

Helen Johnson, 6010 NW 63rd Place, Parkland, FL 33067.

I authorize the Bureau of Prisons to transmit my property and personal effects including money remaining to my credit in, or due me from the Bureau of Prisons to my next of kin in accordance with state law.

I agree further that disposition may be made of my personal property located within the prison facility, including clothing, in accordance with the rules and regulations of the Bureau of Prisons.

EXHIBIT 5

In case of serious illness or other emergency the above named persons may be contacted to be notified of my condition. I also desire and authorize that the following be notified.

Signature of Inmate Leslie Perkins "s/" Date 3/7/05

I hereby certify that the above notification was (cross out incorrect statement) (provided to the inmate to read) and / or was (~~read and fully explained by me to the above inmate~~) before the inmate (voluntarily signed) / (~~refused to sign~~) this notification, this 07 day of Mar, 2005.

Printed Name / Signature of Staff Member

H. Crespo "s/" Date 03/07/05

Record Copy – Central File; Copy – Inmate

(This form may be replicated via WP)

This form replaces BP-408 (58) dated August 1991.

EXHIBIT 5

Supreme Court, U.S.
FILED
071518 MAR 24 2008
OFFICE OF THE CLERK

DOCKET NO : _____

IN THE
SUPREME COURT
OF THE
UNITED STATES

LESLIE PERKINS,
Petitioner,
Vs.

UNITED STATES OF AMERICA
Respondent

ON PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

SECOND BOOK

Leslie Perkins (57160-004)
Petitioner, Pro Se
FCC Coleman Camp
PO Box 1027
Coleman, FL 33521-1027

IN THE UNITED STATES COURT OF

APPEALS FOR THE ELEVENTH CIRCUIT

NO. 07-13577 – F

FILED
US COURT OF APPEALS
ELEVENTH CIRCUIT

NOV 08, 2007

THOMAS K. KAHN
CLERK

LESLIE PERKINS,
Petitioner- Appellant,
versus

UNITED STATES OF AMERICA,
Respondent – Appellee.

Appeal from the United States District Court for the Southern District of Florida

---

ORDER:

Appellant has filed a motion for a certificate of appealability in order to appeal the denial of his 28

U.S.C. § 2255 motion to vacate, which was dismissed as procedurally

barred. In Slack v McDaniel, 529 U.S. 473, 484, 120 S.Ct. 1595, 1604, 146 L.ED.2d 542 (2000), the Supreme Court held that, where the district court has denied a habeas petition on procedural grounds, the petitioner must show that jurists of reason would find it debatable whether (1) the district court was correct in its procedural ruling, and (2) the petition state a valid claim of the denial of a constitutional right. If the petitioner fails to satisfy either prong of this two-part test, a court should deny a certificate of appealability. Id.

In his § 2255 motion, appellant raised the following claims:

(1) the admission of audio recordings during trial violated her Sixth

Amendment right to confront and cross-examine witnesses;

(2) the district court erred by admitting recordings of telephone conversations she had while in jail;

(3) the district court violated her Sixth Amendment rights by enhancing her sentence on the basis of facts not found by the jury beyond a reasonable doubt; and

(4) the evidence was insufficient to support her convictions

Each of the appellant's claims either was raised on direct appeal or could have been raised on direct appeal. "The district court is not required to

reconsider claims of error that were raised and disposed of on direct appeal," United States v Nyhuis, 211 F.3d 1340, 1343 (11th Cir. 2000). Additionally, the district court generally does not address issues that could have been raised on direct appeal, unless the petitioner can show cause and prejudice to excuse the default or that a fundamental miscarriage of justice will occur. United States v. Montano, 398 F.3d 1276, 1280 (11th Cir. 2005).

Appellant's first claim could have been raised on direct appeal. Appellant argued that this claim was based upon newly discovered evidence that the audio recordings of her husband speaking with an undercover officer, which were admitted during trial, contained false information. She maintained that, after trial, her husband, a codefendant, admitted that he lied to the officer posing as a coconspirator about his drug dealing to create the belief that he

and the appellant had been involved in large drug deals and that they had sufficient funds to pay for the drugs, when they did not.

In order to obtain relief based upon a claim of newly discovered evidence, a movant must show that: (1) the evidence was discovered after trial, (2) the failure of the defendant to discover the evidence was not due to a lack of diligence, (3) the evidence is not merely cumulative or impeaching, (4) the evidence is material to issues before the court, and (5) the evidence is such that a new trial would probably produce a different result. Lynn v. United States, 365 F.3d 1225, 1237 (11th Cir. 2004).

Appellant failed to establish she was entitled to relief. The fact that her husband made a false statement to the undercover officer could have been discovered before trial. The defense was free to speak with the appellant's husband and to question

him regarding the veracity of his statements. Additionally, this alleged new evidence did not exonerate appellant or show that she did not participate in the conspiracy. Therefore, appellant failed to show cause or prejudice for her default and this claim was procedurally barred.

Appellant's second, third, and fourth claims were raised on direct appeal and rejected by this Court. See United States v. Appellant, No. 05-15810 (11th Cir. October 26, 2006) (unpublished opinion). With respect to her third claim, that the district court erred in admitting audiotapes of telephone calls she made from jail, appellant argued that this claim was not procedurally defaulted because appellate counsel was ineffective for failing to make certain substantive arguments in support of this claim on direct appeal. Appellant argued that, although she signed the consent form and had no

expectation of privacy, she would not have signed the form had she known the calls could be used against her in court. She also maintained that the calls should not have been played for the jury because there was no probable cause to believe that she was furthering a conspiracy, involved in new crimes, or threatening the security of the jail when she made the calls.

Appellant did not demonstrate that counsel failed to raise a meritorious legal challenge to the admission of the recordings on appeal. She admitted that she consented to the recording of the conversations and had no expectation of privacy. Additionally, she did not demonstrate she was prejudiced. She did not explain the substance of the conversations or how these recordings affected the outcome of her trial. Therefore, she failed to

demonstrate her counsel was ineffective and could not overcome her procedural default.

Appellant's motion for a certificate of appealability is DENIED because appellant has failed to show that the district court's procedural ruling is debatable. Slack, 529 U.S. at 484, 120 S.Ct at 1604, 146 L.Ed.2d 542 (2000).

"s/"
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF

APPEALS FOR THE ELEVENTH CIRCUIT

NO. 07-13577 – F

FILED
US COURT OF APPEALS
ELEVENTH CIRCUIT

DEC 27, 2007

THOMAS K. KAHN
CLERK

LESLIE PERKINS,
Petitioner- Appellant,
versus

UNITED STATES OF AMERICA,
Respondent – Appellee.

Appeal from the United States District Court for the Southern District of Florida

---

Before ANDERSON and HULL, Circuit Judges.

BY THE COURT:

Appellant has filed a motion for reconsideration of this court's order dated November 8, 2007, denying her motion for a certificate of appealability. Upon reconsideration, appellant's motion for a certificate of appealability is DENIED because appellant has failed to make the requisite showing. 28 U.S.C. § 2253 (c) (2); Slack v. McDaniel, 529 U.S. 473, 484, 120 S.Ct. 1595, 1604, 146 L.Ed.2d 542 (2000); United States v. Montano, 398 F.3d 1276, 1280 (11th Cir. 2005); United Sates v. Nyhuis, 211 F.3d 1340, 1343 (11th Cir. 2000); Walker v. Jones, 10 F.3d 1569, 1572 (11th Cir. 1994).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 07 – CV – 60559

LESLIE PERKINS,
Movant,
Vs.

UNITED STATES OF AMERICA,
Respondent.
_____/

ORDER DENYING MOTION TO VACATE

THIS CAUSE is before the Court on the Movant, Leslie Perkins', Motion to Vacate, Set Aside or Correct Sentence Pursuant to Title 28 U.S. C. Section 2255 ("Motion to Vacate"). The Court has reviewed the Motion to Vacate, the Government's Response, Movant's Motion to Reply to Government's Response [sic] and pertinent portions of the record. For the reasons discussed below, the Motion to Vacate is DENIED.

BACKGROUND

APPENDIX B

Movant and her husband, Joel Perkins, were indicted and charged with conspiracy to import five kilograms or more of cocaine into the United States (Count I); conspiracy to possess with intent to distribute five kilograms or more of cocaine (Count II); and possession with intent to distribute 500 grams or more of cocaine, (Count III) (CR-DE 27).

Co-defendant Joel Perkins pled guilty to Count I pursuant to a plea agreement wit the United States (CR-DE 56). Movant elected to go to trial. After a jury trial, she was convicted of Counts I and II and acquitted of Count III. The jury found that she had conspired to import and to posses at least 15 kilograms but less than 50 kilograms of cocaine. Movant's motion for judgment of acquittal at the close of the government's case and her post-trial renewed motions for judgment of acquittal, and for a new trial were denied. The Court sentenced Movant

to two concurrent terms of 210 month of imprisonment followed by concurrent five-year terms of supervised release, and a special assessment of $200 (CR-DE 98).

The Eleventh Circuit Court of Appeals affirmed Movant's conviction and sentence in an unpublished decision. On February 20, 2007, the Supreme Court denied certiorari review. *Perkins vs United States*, 127 S.CT. 1344 (2077). On April 18, 2007, Movant timely filed this Motion to vacate.

Movant seeks relief based on the following grounds as described in her Motion to Vacate:

1. "Recordings made in "furtherance of the conspiracy" did not provide sufficient indicia of reliability and accuracy to be admissible at trial. Due process violation and Sixth Amendment right to confront and cross-examine adverse

witnesses....New discovery material was not available at defendant's trial;"

2. "The district court erred ... when admitting "jailhouse recording," claiming breach of consent, Title III and Bruton";
3. "The district erred, violating defendant's Sixth Amendment rights for gun enhancement to be decided by a jury beyond a reasonable doubt: and Right to confront;"
4. "Insufficient evidence; dismiss the indictment."

GROUNDS 2, 3, AND 4

The claim set forth in Grounds 2, 3, and 4 of the Motion to Vacate were addressed and rejected by the Eleventh Circuit on appeal. Consequently, they may not be reconsidered here. *Mills vs. United States,* 36 F.3d 1052, 1056 (11th Cir. 1994), cert.

denied, 115 S.Ct. 1966(1995); *United States v. Hobson,* 825 F.2d 364, 366 (11th Cir 1987), *cert. granted and judgment vacated on other grounds,* 492 U.S. 913 (1989); *United States v. Kalish,* 780 F.2d 506, 508 (5th Cir.), *cert. denied,* 476 U.S. 1118 (1986); and *United States v. Rowan, 663 F.2d 1034, 1035 (11th Cir. 1981). See also, Withrow v. Williams,* 507 U.S. 680, 7210-721 (1993) ("[F]ederal courts have found uniformly held that, absent countervailing considerations, district courts may refuse to reach the merits of a constitutional claim previously raised and rejected on direct appeal.... Thus, prior opportunity for full and fair litigation is normally dispositive of a federal prisoner's habeas claim.").

With respect to ground 2 claiming that the district court erred when admitting "jailhouse recordings," claiming breach of consent, Title III and Bruton, Movant apparently contends that is is not

procedurally barred. In essence, Movant contends that the Eleventh Circuit did not address the issue because her appellate counsel left out one specific substantive argument in support of the claim. It is not clear how appellate counsel failed to raise any additional, viable arguments in this regard.

On direct appeal, Movant claimed that the Court erred by allowing seven tapes of her jailhouse conversations with co-conspirator Marvin Johnson to be played. The eleventh Circuit resolved the issue as follows:

> Perkins does not explain how or why these evidentiary decisions were prejudicial or improper. *In Davis v. Hill Engineering, Inc.*, 549 F.2d 314, 324 (5th Cir. 1977), *overruled on other grounds, Gautreaux v Scurlock Mrine, Inc.*, 107 F.3d 331, 339 (5th Cir. 1997), our predecessor held that, where an appellant did

not specify on appeal how a district court's decisions was in error, the Court had no basis on which to consider the appeal. *Davis,* 549 F.2d at 324. In the instant case, Leslie Perkins argues that "[t][sheer] volume of these conversations improperly became the focus of the trial and prejudice overcame any possible probative value," but she gives no explanation as to what was on the tapes, why it was improper for them to become the focus of the trial or how they were prejudicial. With no substantive arguments to consider on these points, we do not address them.

(CR-DE 139, P. 13-14).

In an effort to resurrect this argument in this collateral proceedings, Movant makes a "substantive argument" that she claims appellate counsel allegedly should have made, but failed to make on

appeal. In any event, the substantives argument is, and would have been found on appeal, without merit. Moreover, there is a further procedural bar to the claim.

Movant's argument can be summarized as follows: Movant acknowledged she signed a consent to use the telephone at the Federal Detention Center in Miami. The consent form informed her that phone calls were monitored and recorded for the purpose of the security of the institution and to protect the public. She further acknowledges she had no expectation of privacy when in custody of the Bureau of Prisons, and that the calls were not illegally recorded or improperly disclosed to the Government. Nevertheless, Movant argues that the recorded conversations were improperly used at her trial where there was no probable cause to believe that she was furthering the conspiracy through the calls,

or that she was involved in a new crimes, or threatening the security of the institution. Movant sates that she would not have signed the consent if she had known that the recordings could be used against her in court when she had not violated the stated purpose of the consent; in other words, to protect the security of the institution and to protect the public. Movant contends that the government "used the prison security as a guise for what was essentially an effort to gain incriminating evidence for use against defendant in trial."

Because Movant did not raise this issue previously on the same basis that is alleged here, either in the district court or on direct appeal, she is barred from raising it in this proceeding, unless she can show cause excusing her failure to raise the issue previously and actual prejudice resulting from the alleged error, or a fundamental miscarriage of

justice. *Holladay v. Haley,* 209 F,3d 1243, 1254 (11th Cir. 2000); *United States v. Nyhuis,* 211 F.3d 1340, 1344 (11th Cir. 2000).

Movant claims that counsel was deficient on appeal for failing to raise the claim on the basis she is alleging here. Although ineffective assistance of counsel may satisfy the cause exception to a procedural bar, it will do so only if a review of the claim Movant complains counsel failed to raise was significant enough to have effected the outcome of the case. *Holladay v. Haley,* 209 F.3d at 1254; *United States v. Nyhuis,* 211 F.3d at 1344. Counsel's conduct, of course, is measured under the two-pronged test set out by the Supreme Court in *Strickland vs. Washington,* 466 U.S. 668 (1984, which instructs that a defendant must demonstrate both that (1) counsel's performance was deficient or unreasonable under prevailing professional norms;

and (2) counsel's deficient performance prejudiced the defense, producing a result which is unreliable. *Id.* At 687-688, 94, 697. Movant's has not established that counsel was either constitutionally deficient or that she was prejudiced by any alleged deficiency.

Movant provides no legal basis, and the Court is unaware of any legal basis for her argument tht the admission of the recorded conversations violated any recognizable constitutional right. Movant merely recites the phrases "breach of consent, Title III, and Bruton" in the heading of this argument as the legal basis for relief. In addition to Movant's deficiencies in articulating this particular argument, as a matter of law, the law is clear her rights were not violated by use of the recordings. The telephones were legally obtained and their introduction at trial did not implicate any "Bruton" or Confrontation Clause rights.

Because Movant's argument in support of Ground 2 lacks legal support, her appellate counsel was not effective for failing to pursue this claim. Accordingly, Ground 2 is rejected.

GROUND 1

Movant claims that the recordings made "in furtherance of the conspiracy" did not provide sufficient indicia of reliability and accuracy to be admissible at trial, causing a due process violation and violation of her Sixth Amendment right to confront and cross-examine adverse witnesses. However, Movant makes no cogent or persuasive argument in respect to those contentions. Rather, Movant argues this claim as a newly discovered evidence contention. This is particularly evident from her discussion in the motion to Reply Memorandum. In support of Ground 1, Movant claims that co-defendant, husband, Joel Perkins

made a statement after her trial in which he admitted that he had made false statements to the undercover agent about his drug dealing experience during the course of the conspiracy to create the belief that he had and Movant had been involved in large drug deals and that they had sufficient funds to pay for the drugs when in fact they did not.

Movant did not raise this claim previously, either in this Court or on direct appeal. Consequently, unless Movant can establish cause excusing her failure to raise the issue previously and actual prejudice resulting form the alleged error, or a fundamental miscarriage of justice, the issue is procedurally barred. Movant explains that the issue was not previously presented because she did not have this information at the time of her trial. Movant thus casts this claim as a newly discovered evidence claim. In this regard, she has not carried

her burden to show a basis for relief under this theory or to overcome her procedural default.

In addressing a newly discovered evidence claim in the §2255 context, the Eleventh Circuit has held:

> This court has concluded that §2255 motions based on new evidence are subject to the standards generally applicable to motions for a new trial based on new evidence [citations omitted] There are now five requirements that a movant must satisfy before a new trial will be granted based on newly discovered evidence. *United States v. Jernigan,* 341 F.3d 1273, 127 (11th Cir. 2003). The five requirements are as follows:
>
> > (1) the evidence was discovered after trial, (2) the failure of the defendant to discover the evidence was not due

to a lack of diligence, (3) the evidence is not merely cumulative or impeaching, (4) the evidence is material to issues before the court, and (5) the evidence is such that a new trial would probably produce a different result. Id. (Citations omitted) Furthermore, "we have held that motions for a new trial are highly disfavored, and that district courts should use great caution in granting a new trial motion based on newly discovered evidence." Id. (Internal quotation marks and citations omitted). [The movant] would have to satisfy these five requirements to obtain a new trial based on new evidence if the issue

> was reaised on direct appeal. The standard is arguably higher, but certainly no lower, for [movant] to obtain a new trial based on new evidence through a §2255 proceeding.

Lynn v. United States, 365 F.3d 1225, 1237 (11th Cir. 2004).

Based on this standard, Movants's claim is deficient in several respects. The alleged statement by Movant's co-defendant Joel Perkins is not new evidence, is not material and is not evidence which would probably produce a different result in a new trial. Movant does not establish that her husband's statement to the undiscovered agent was not discoverable by the exercise of due diligence. Even if she had, the alleged misrepresentation constituted at most, mere puffing by Joel Perkins to establish his

credibility as an experienced and capable drug dealer to bolster his chance of convincing his intended co-conspirator to do business with him. Joel Perkins' statement is not material and does not undermine the evidence upon which the jury found Movant guilty. The Court finds that even if Movant had been able to introduce Joel Perkins' statement into evidence at trial and she was able to argue the substance of the statement to the jury, together with showing that sham cocaine, rather than actual cocaine, was used, there is no reasonable probability that the outcome of the trial would have been different or that the recordings would have been ruled inadmissible as unreliable. Accordingly, the Court concludes that Movant's argument 1, including it's "newly discovered evidence" characterization is unpersuasive. Such evidence, even if truly newly discovered evidence, is insufficient t satisfy the

standard for reviewing "newly discovered evidence" claims in a §2255 proceeding. At best it merely reinforces the suggestion that Joel Perkins, and presumably his wife, Movant, were anxious to enter into the drug deal. This ground is denied.

CONCLUSION

For the foregoing reasons, Movant's Motion to Vacate, Set Aside or Correct Sentence pursuant to Title 28, U.S.C., Section 2255 is DENIED. All other pending motions are denied as moot and the Clerk shall close this filed.

DONE AND ORDERED in Chambers this 12th day of June 2007.

"s/"

PAUL C. HUCK
U.S. DISTRICT COURT JUDGE

Copies furnished to:
All Counsel of record.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 07-CV-60559

LESLIE PERKINS,
Movant

Vs.

UNITED STATES OF AMERICA,
Respondent
_____/

ORDER DENYING MOTION FOR RECONSIDERATION AND CERTIFICATE OF APPEALABILITY

THIS CAUSE is before the Court upon Movant's Motion of Reconsideration, or in the Alternate, Grant Certificate of Appealability [D.E. #16], filed on July 27, 2007. Reconsideration is an extraordinary remedy reserved for three circumstances: "1) an intervening change in controlling law; 2) the availability of new evidence; and 3) the need to correct clear error or prevent

APPENDIX B 1

manifest injustice." *Williams v. Cruise Ships Catering & Service Int'l, N.V.,* 320 F Sup. 2d 1347, 1357-58 (S.D. Fla. 2004); *Reyher v Equitable Life Assur. Soc.,* 900 F.Supp. 428, 430 (M.D. Fla. 1995). A motion for reconsideration is not intended to be a tool for relitigating what a court has already decided. *Reyher,* 900 F.Supp. at 430. Rather, it "must demonstrate why the court should reconsider its prior decision and set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision." *Id.* (internal quotations omitted). Because Movant filed the instant case *pro se,* the Motion must be "liberally construed" and "held to less stringent standards than [motions] drafted by lawyers." *Erickson v Pardus,* 127 S.Ct. 2197, 2200 (2007) (quoting *Estelle v. Gamble,* 429 U.S. 97 (1976).

Movant bases his Motion on four grounds. None of the limited circumstances that justify reconsideration apply in this case. Movant has presented neither an intervening change in controlling law, nor new evidence, nor the need to correct clear error or prevent manifest injustice.

In the alternative, Movant requests that the Court issue a Certificate of Appealability Pursuant to 28 U.S.C. §2253(c) an appeal may not be taken from a final order in a habeas corpus proceeding unless a Certificate of Appealability is issued. The certificate must contain a finding that the applicant has made a substantial showing of the denial or a constitutional right and must indicate which specific issue or issues satisfy the required showing. Applying these standards, the Court finds that there is no substantial showing of a denial of a constitutional right. Accordingly, it is hereby

ORDERED that Movant's Motion of Reconsideration, or in the Alternate, Grant Certificate of Appealability is DENIED.

DONE AND ORDERED in Chambers this 31st day of July 2007.

"s/"

PAUL C. HUCK
U.S. DISTRICT COURT JUDGE

Copies furnished to
All counsel of record

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 05-15810
Non-Argument Calendar

D.C. DOCKET No. 05-60106-CR-WPD

FILED

US COURT OF APPEALS
ELEVENTH CIRCUIT

October 26, 2006

THOMAS K. KAHN
CLERK

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

Versus

LESLIE PERKINS,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

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APPENDIX C [1]

(October 26, 2006)

Before TJOFLAT, BARKETT and HULL, Circuit Judges.

PER CURIAM:

Leslie Perkins appeals her convictions and 210-month sentences for conspiracy to import cocaine, in violation of 21 U.S.C. § 963, and conspiracy to possess with the intent to distribute cocaine, in violation of 21 U.S.C. §846. She challenges both her conviction and her sentence on multiple grounds. Having considered her arguments in light of the law and the record, we affirm.

I. Sufficiency of the Evidence

Perkins argues that the evidence was insufficient to support a conviction on the conspiracy counts. First, she contends that if there was any agreement, it was an agreement to smuggle a person, rather than drugs, into the United States. She also argues

that her mere knowledge that others in the Bahamas had cocaine was insufficient to show her active participation in an agreement to import. Finally, she argues that there was no conspiracy because the purported "cocaine" with which she was found upon her arrest was actually fake.

We review de novo challenges to the sufficiency of the evidence, viewing the evidence in the light most favorable to the government. United states v. Futrell, 209 F.3d 1286, 1288 (11th Cir. 2000). To support a conviction for conspiracy to import cocaine, "the government must prove beyond a reasonable doubt that there existed an agreement between two or more persons to import narcotics into the United States and that the defendant knowingly and voluntarily participated in that agreement." United States v. Arbane, 446 F.3d 1223, 1228 (11th Cir. 2006).

In the instant case, DEA Agent Randy Matschner testified at trial that the investigation of Leslie Perkins and her husband, Joel Perkins, began when he was advised that Joel Perkins was looking for a boat to import cocaine from Freeport to the United States.

Agent Matschner testified that he contacted Joel Perkins and they arranged a deal for March 2005 whereby Matschner would pick 20 kilos of cocaine up from Joel Perkins and do a "turn around trip"[1] to pick up another 40 kilos. Subsequently, Matschner met with both Leslie and Joel Perkins in Deerfield Beach, Florida and testified that Leslie Perkins participated in the conversation regarding

[1] Matschner stated that a "turn around" was a return trip, for more cocaine, immediately after unloading the first shipment.

the planned trip to pick up the cocaine, ultimately suggesting that she would be on the boat when Matschner met it to transfer the cocaine. Matschner testified that Joel and Leslie Perkins again later contacted him by three-way telephone call to discuss Leslie Perkins boarding the vessel in the Bahamas and return to the United States with the cocaine. Agent Matschner testified that he advised her to pack the cocaine in 20 kilo amounts, packaged on ice and hidden from view by frozen seafood.

Agent Matschner, along with other agents, proceeded to leave Fort Lauderdale, Florida for the Bahamas. According to Matschner, Joel Perkins contacted him, via cell phone, while he was on the boat and told the Agent that Leslie Perkins was waiting for him in the Bahamas. Matschner then made telephonic contact with Leslie Perkins and gave her the coordinates of his boat's location.

Matschner stated that Leslie Perkins told him she would be arriving to meet his ship in a small white Boston Whaler.

According to Matschner, when he saw the Boston Whaler approaching he observed three persons on board the boat: (1) Marvin Johnson, the supplier of the drugs, (2) Leslie Perkins, and (3) an unidentified Bahamian male. Matschner testified that both Johnson and the other man had pistols tucked into their waistbands. Matschner stated that, as the Boston Whaler was alongside the undercover boat, he asked Leslie Perkins if the dope was in the cooler, and Leslie Perkins responded "yes." Matschner testified that after he helped Leslie Perkins onto the boat, Johnson handed him the cooler. Matschner asked Johnson if the dope was in the cooler, and Johnson responded in the affirmative.[2]

[2]Agent Coddington corroborated Agent Matchner's testimony. Agent Coddington testified that he was on board the undercover vessel for security purposes, concealed in the cabin area of the boat. According to Coddington, he observed a small boat approach their boat, containing two black males and Leslie Perkins. Coddington stated that he observed pistols in the waistbands of the two men. Coddington testified that Matschner led Leslie Perkins into the cabin, and Coddington detained her.

At that point, Leslie Perkins was placed in custody. According to Matschner, when he opened the cooler, it was packed the way he had advised Leslie Perkins to pack it, with ice and 20-kilo packages, except that there was no fish or lobster.

When Matschner submitted the packages for analysis by the DEA lab, the analysis revealed that the cocaine was fake and that the packages he retrieved contained no controlled substance. A search of Leslie and Joel Perkins's home, however, revealed cocaine. Agent Coddington, who led the search of the home, testified that, in the master

bedroom of the Perkins home, he found a shoe box containing a large amount of U.S. currency and a kilo-sized cocaine brick. Coddington testified that the cocaine brick was tested and was a high quality of cocaine. Coddington testified that a green backpack found in the house contained fake dope and a large digital scale was also found in the backpack. Coddington testified that the agents conducting the search of the Perkins home also found a gray safe in the master closet which contained money and a a Ziploc bag containing 427.8 grams of cocaine.

Based on the above, we conclude that sufficient evidence was presented from which a jury could have found that Leslie Perkins was part of the conspiracy to import cocaine. Furthermore, the fact that the cocaine loaded onto the undercover boat was fake is not inconsistent with the conclusion that the evidence was sufficient to support a conspiracy

conviction. Although our predecessor Court, in United States v. Murray, 527 F.2d 401 (5th Cir. 1976), reversed a conviction where the defendant sold fake dope, that case is inapplicable here. In Murray, the defendant not only sold fake dope, but his actions were consistent with someone who intended only to sell a fake substance. Murray, 527 F.2d at 409. In this case there was sufficient evidence by which the jury could have inferred tht the conspirators' behavior was consistent with an intention to import an actual illegal substance. For example, there was much discussion about a turn around trip, on which Matschner would pick up 40 kilograms of cocaine, and the jury could have reasonably inferred that the first trip was intended as a test run. Furthermore, the jury could infer that the conspirators' behavior was inconsistent with an intention only to import a fake substance. Actual

money was exchanged, and, since the drugs belonged to Johnson, the conspirators had nothing to gain from importing a fake substance. Additionally, there was no evidence that Leslie Perkins knew that the cocaine was fake, and the jury could infer that she did know. In a recorded jailhouse telephone conversations between Leslie Perkins and Johnson, Johnson referred to ***his*** decision to put fake drugs on the boat. In this way, the jury reasonably could interpret the facts of this case to be distinguishable from those in Murray. Thus, "a reasonable trier of fact, choosing amount reasonable interpretations of the evidence, could find guilt beyond a reasonable doubt." United States v. Baker, 432 F.3d 1189, 1231 (11th Cir. 2005).

II. Evidentiary Issues

Perkins argues that the aggregation of alleged errors in the district court's evidentiary rulings

mandates a new trial.[3] Perkins first argues that she was prejudiced by the playing of the tape of a jailhouse telephone conversation with Johnson, an alleged co-conspirator, in which she made reference to her decision to remain silent and not talk to law enforcement. She argues that the district court failed to properly instruct the Jury regarding her right to remain silent. See Doyle v Ohio, 426 U.S. 610, 619 (1976) ("[I]t would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.").

[3]We review a district court's evidentiary rulings for an abuse of discretion:

[3]An abuse of discretion arises when the district court's decision rests upon a clearly erroneous finding of fact, an errant conclusion of law, or an improper application

> of law to fact. We review preserved evidentiary objections for harless error. However, when a party raises a claim of evidentiary error for the first time on appeal, we review it for plain error only. Under the plain error standard, before an appellate court can correct an error not raised at trial, there must be (1) error, (2) that is plain, and (3) that affects substantial rights. If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or pubic reputation of judicial proceedings. Further, we must review the prejudicial effect of all evidentiary errors, evaluated under both preserved and plain error standards, in the aggregate. We will therefore reverse if the cumulative effect of the errors in prejudicial, even if the prejudice caused by each individual error was harmless.

Baker, 432 F.3d at 1202-03 (internal citations omitted).

In United States v. Miller, 255 F.3d 1282, 1285-86 (11th Cir. 2001), we held that:

> [a] [Doyle] violation is harmless if the error had no substantial and injurious effect or influence in determining the jury's verdict.

> For example, we have repeatedly held harmless a prosecutor's single reference to the defendant's post-miranda silence if it occurs during a trial at which the government's evidence was otherwise overwhelming. This is especially so where the prosecutor makes no further attempt to 'highlight' the defendant's exercise of Miranda rights either in questioning other witnesses or during closing argument.

Miller, 255 F.3d at 1285-86 (internal citations and quotation marks omitted).

In the instant case, not only were the references to Perkins's silence not highlighted, but in addition, the district court gave a curative instruction and redacted the references from the transcript before sending it to the jury room. Under these circumstances, we cannot say that any error

had a "substantial and injurious effect or influence in determining the jury's verdict," and thus, any error was harmless. Id.

Perkins next argues that she was prejudiced by Agent Matschner's "blurting his improper comments and opinions about" Leslie Perkins being in the Bahamas, having contacts in the Bahamas, and calling telephone numbers in the Bahamas. She argues that the jury was left with the conclusion that the agents had information not available to the jury, giving improper weight to the government's case. She argues that the district court erred in admitting evidence of her trips and telephone calls to the Bahamas the year prior to her arrest.

Perkins concedes on appeal that her objections to the challenged "improper" testimony were sustained. Furthermore, evidence of Leslie Perkin's frequent travel t the Bahamas during the course of

the investigation, together with telephone records showing contact between her phone and those of Joel Perkins and Johnson, while perhaps not proof of participation in the conspiracy, are consistent with and probative of such participation.[4] The purpose of some or all of Leslie Perkins's travel to the Bahamas may in fact have been innocuous. However, the government was required to show that Leslie Perkins had contact with the drug sources in the Bahamas, including Johnson, and the jury could interpret this evidence as probative of that fact.

[4]As we have explained:

> Evidence is relevant if it has 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.' Fed.R.Evid. 401. In a criminal trial, issues of consequence generally consist of 'the elements of the

> offenses charged and the relevant defenses (if any) raised to defeat criminal liability.' United States v. Hall, 653 F.2d 1002, 1005 (5th Cir. 1981). '[R]elevant evidence is admissible,' but 'may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.' Fed.R.Evid. 402 and 403.

United States v. Williams, 51 F.3d 1004, 1010 (11th Cir. 1995), abrogated on other grounds, Jones v U.S., 526 U.S. 227, 231-32 (1999).

Perkins next argues that she was prejudiced by Agent Coddington referring to her and Joel Perkins's family home as "her" home and the bedroom as "her" bedroom. Perkins concedes that all timely objections to such references were sustained, but again argues that the jury was left with the conclusion that the agents had information not available to the jury, giving improper weight to the government's case. Agent Matschner testified,

without objections, that: (1) Leslie Perkins gave him her address: 3705 Northwest 82nd Ave., Coral Springs, Florida; (2) the residence was in fact that of Leslie Perkins; (3) he had discovered that Joel Perkins lived at that same address; (4) a search warrant was obtained for the Perkins residence; and (5) that the warrant was executed on March 7 with Agent Ron Coddington the primary agent in charge. Agent Coddington testified, without objection, that the search warrant was executed in the house at 3705 Northwest 82nd Ave., Coral Springs, Florida. It was not prejudicial to refer to the house as Leslie Perkins's house, and the bedroom in the house as Leslie Perkins's bedroom, when it was properly established that the house belonged to her and her husband.

Perkins next argues that her objection was erroneously overruled as to Agent Matschner's

statement that his life might be in danger, which was why he gave Perkins a fake address. He testified that a false address was necessary "so nobody's life would be in jeopardy." We see no prejudice resulting from the admission of this statement, as the jury could reasonably infer that the use of a real address, in an undercover operation, as a general rule and without any specific reference to the individuals in the instant case, poses an unreasonable risk. The jury could similarly infer that the use of a fake address in such operations is prudent, again, with no necessary reflection on the individuals in the instant case. We do not find reversible error.

Finally, Perkins argues that the district court erred by allowing seven tapes of her jailhouse conversations with Johnson to be played, and erred further by allowing the transcripts to be taken to the

jury room. She contends that a government chart outlining her telephone calls was improperly admitted and allowed in the jury room during deliberations. Perkins does not explain how or why these evidentiary decisions were prejudicial or improper. In Davis v. Hill Engineering, Inc., 549 F.2d 314, 324 (5th Cir. 1977), overruled on other grounds, Gautreaux v. Scurlock Marine. Inc., 107 F.3d 331, 339 (5th Cir. 1977), our predecessor held that, where an appellant did not specify on appeal how a district court's decision was in error, the Court had no basis on which to consider the appeal. Davis, 549 F.2d at 324. In the instant case, Leslie Perkins argues that "[t]he [sheer] volume of these conversations improperly became the focus of the trial and prejudice overcame any possible probative value," but she gives no explanation as to what was on the tapes, why it ws improper for them to become

the focus of the trial, or how they were prejudicial. With no substantive arguments to consider on these points, we do not address them.

III. Prosecutorial Misconduct

Perkins argues that the prosecutor engaged in misconduct by: (1) attempting to exclude minority jurors, (2) engaging in a variety of personal attacks during the trial, (3) failing to redact a tape, and (4) failing to call Joel Perkins as a witness after suggesting that it would. In assessing claims of prosecutorial misconduct, we apply a two part test:

> the challenged statements must be improper, and must have prejudicially affected the defendant's substantial rights. A defendant's substantial rights are prejudicially affected when a reasonable probability arises that, but for the remarks, the outcome would be different. Claims of prosecutorial misconduct

are fact specific inquiries which must be conducted against the backdrop of the entire record.

United States v. Hall, 47 F.3d 1091, 1098 (11th Cir. 1995).

With respect to jury selection, Perkins argues that the prosecutor engaged in misconduct by striking black jurors. However, Perkins doe not cite Batson v. Kentucky, 476 U.S. 79 (1986), or any other case to support her argument. Further, she gives no indication, and the transcript of jury selection gives no indication, of how many blacks were in the venire, how many, if any, went unchallenged by the prosecutor, and how many were ultimately allowed on the jury. When a defendant fails to offer argument on an issue, it is abandoned. United States v. Cunningham, 1161 F.3d 1343, 1344 (11th Cir. 1998). In the absence of supporting facts,

together with the absence of any law, her argument about jury selection must fail.

Perkins's second assertion of prosecutorial misconduct regards alleged personal attacks and criticism of defense counsel made by the prosecutor during trial. Perkins contends that the prosecutor improperly: (1) referred to Perkins as a "drug dealer" when addressing the jury; (2) implied that there was information from Brian, the informant who first supplied Agent Matschner with the tip about Joel Perkins; (3) implied additional information by asking witnesses to explain or give opinions about tape recordings; and (4) gave her personal opinion on the validity of the defense presented by stating that "she never heard of a withdrawal defense after a subject was arrested." Perkins argues that the prosecutor's references to her as a "drug dealer" in her opening statement and closing argument were improper

under our precedent in United States v Blakey, 14 F.3d 1557, 1560 (11th Cir. 1994). That case involved a statement that went outside the evidence and that the government conceded at trial was not true. Blakey, 14 F.3d at 1560. In the instant case, the prosecutor's statement was consistent with the evidence. Furthermore, given the volume of evidence against her, Perkins has not shown that there is a reasonable probability that, but for the challenged conduct of the prosecutor, the outcome of the trial would have been different. See Hall, 47 F.3d at 1098.

Third, Perkins argues that the prosecutor failed to properly redact the tape that included Leslie Perkins's references to remaining silent and commented on Leslie Perkins's silence. She argues that the prosecutor commented during closing argument that "the jury did not hear the Appellant

deny possession or ownership of drugs." As discussed above, the failure to redat the tape of the jailhouse conversation was harmless error because it "had no substantial and injurious effect, or influence I determining the jury's verdict." See Miller, 255 F.3d at 1285-86. Thus, it similarly did not result in a reasonable probability that, but for the challenged conduct of the prosecutor, the outcome of the trial would have been different. See Hall, 47 F.3d at 1098. As for the reference to Perkins's failure to deny possession of drugs, this was a reference to a conversation with Johnson. Thus, Perkins's silence was not with respect to the court or to law enforcement, but with respect to her own co-conspirator. Thus, the reference was not erroneous.

Finally, Perkins argues that the government improperly advised the court and the defense that it would call Joel Perkins as a witness, and then did

not do so, after it had forced the defense to address before the jury the fact that Joel Perkins had pled guilty and was cooperating with the government. Leslie Perkins has failed to show how her being forced to address before the jury the fact that Joel Perkins had pled guilty and was cooperating with the government created a reasonable probability that, but for the challenged conduct of the prosecutor, the outcome of the trial would have been different. See Hall, 47 F.3d at 1098. For these reasons, we find no evidence of prejudicial prosecutorial misconduct.

IV. Denial of Motion for New Trial

Perkins argues that the verdict was against the weight of the evidence and thus the district court erred in denying her motion for a new trial. We review a district court's denial of a motion for a new trial for abuse of discretion. United States v. Riley, 211 F.3d 1207, 1208 vacated on other grounds, 232

F.3d 844 (11th Cir. 2000). In reviewing a motion for a new trial based on a claim that the verdict is against the great weight of the evidence:

> [i]f the court concludes that, despite the abstract sufficiency of the evidence to sustain the verdict, the evidence preponderates sufficiently heavily against the verdict that a serious miscarriage of justice may have occurred, it may set aside the verdict, grant a new trial, and submit the issues for determination by another jury.

United States v. Martinez 763 F.2d 1297, 1312 (11th Cir. 1985) (internal citations and quotation marks omitted).

As discussed above, many of the errors alleged by Leslie Perkins were not errors. Taking Perkins's claims together with the weight of the evidence arguments discussed above, and weighing them

against the strength of the government's case, the cumulative effect does not result in a miscarriage of justice, and the district court did not abuse its discretion by denying the motion for a new trial.

V. Sentencing

Perkins argues that the district court committed two errors in sentencing. First, she contends that the court erred by enhancing her sentence for the presence of Johnson's gun. She argues that the absence of jury finding on this issue violates United States v Booker, 543 U.S. 220, 244 (205), and that the enhancement was not properly applied nor factually supported. Second, she argues that the district court clearly erred in finding that no reduction was appropriate for her role in the offense.

"Because [Leslie Perkins] objected to the enhancements to [her] sentence in the district court, we review the sentence [de novo]. We will reverse

the district court only if any error was harmful." United States v. Paz, 405 F.3d 946, 948 (11th Cir. 2005) (internal citations omitted).

With respect to the lack of jury findings as to the firearm enhancement, we find no error. If the district court applies the Guidelines as advisory, nothing in Booker prohibits it from making, under a preponderance-of-the-evidence standard, additional factual findings that go beyond a defendant's admission. United States v Chau, 426 F.3d 1318, 1323-24 (11th Cir. 2005); United States v. Crawford, 407 F.3d 1174, 1178-79 (11th Cir. 2005). Perkins's constitutional Booker argument thus fails because the district court applied the Guidelines as advisory and ws thus permitted to make additional factual findings by a preponderance of the evidence. Chau, 426 F.3d at 1323-24.

With respect to the proper applications of the firearm enhancement, §2D1.1(b)(1) of the United States Sentencing Guidelines provides that, with respect to the instant offense conduct involved in Count 1, conspiracy to import cocaine, "[i]f a dangerous weapon (including a firearm) was possessed," the base offense level is increased by two. U.S.S.G. §2D1.1(b)(1). We have held that:

> For a §2D1.1(b)(1) firearms enhancement for a co-conspirator possession to be applied to a convicted defendant, the government must prove by a preponderance of the evidence: (1) the possessor of the firearm was a co-conspirator, (2) the possession was in furtherance of the conspiracy, (3) the defendant was a member of the conspiracy at the time of the possession, and (4) the co-conspirator possession was reasonably foreseeable by the defendant.

United States v. Gallo, 195 F.3d 1278, 1284 (11th Cir. 1999).

In the instant case, Agents Matschner and Coddington both testified that Johnson had a gun at the time of the boat-to-boat transfer. Based on the evidence of Johnson being the source of the drugs and the discussions between Agent Matschner, Joel Perkins, Leslie Perkins, and Johnson, the evidence supports this finding that Johnson was a co-conspirator in the conspiracy to import cocaine. Johnson's possession of the gun at the time of the transfer of the cocaine was thus in furtherance of the conspiracy. Because Leslie Perkins fulfilled her role in the conspiracy by boarding the undercover boat for the purpose of being responsible for the drugs, the evidence indicates that she was a member of the conspiracy at the time of Johnson's possession. Finally, because there is a "frequent and

overpowering connection between the use of firearms and narcotics traffic," United States v. Cruz, 805 F.2d 1464, 1474 (11th Cir. 1986), and because Leslie Perkins was on the Boston Whaler with Johnson at the time Matschner testified that he saw the gun, the evidence indicates that it was reasonably foreseeable to Perkins that Johnson possessed a gun in furtherance of the conspiracy. Accordingly, the district court did not clearly err in finding, by a preponderance of the evidence, that all four Gallo prongs were met, and thus did not err in applying the two-level enhancement for the presence of Johnson's gun.

Perkins' second argument about sentencing is her conclusory statement that the district court's factual finding that no reduction was warranted "was not substantiated and in fact constituted clear error." Perkins offers no support and explains no argument

in support of this conclusion, thus we need not address it. See Cunningham, 161 F.3d at 1344 (holding that, when a defendant fails to offer argument on an issue, it is abandoned).

Upon review of the pleadings, the sentencing transcript, and upon consideration of the briefs of the parties, we find no reversible error.

AFFIRMED.

MICHAEL D. GELETY
Attorney At Law
1209 S. E. Third Avenue
Fort Lauderdale, Florida 33316

Telephone (954) 462-4600
Facsimile (954) 462-0828

November 16, 2006

Leslie Renae Perkins
Reg. No. 57160-004/F4
FCC Coleman Camp
P.O. Box 1027
Coleman, FL 33521-1027

ATTORNEY/CLIENT CORRESPONDENCE

Re: United States v. Perkins, 11th Circuit
Case No.: 05-15810-C
Petition to the U.S. Supreme Court

Dear Leslie:

I hope this letter finds you as well as possible.

Enclosed you will find a copy of our motion in the United States Supreme Court to proceed *in forma pauperis* together with the required affidavit in support of tht motion. Please review these documents, fill them out appropriately and if

EXHIBIT 1

everything is accurate and true, sign the affidavit, have it notarized sign the motion, and return the originals to me in the enclosed envelope, keeping the copies for your own file.

Having repeatedly reviewed the Opinion from the 11th Circuit Court of Appeals and after the follow-up research, I determined that it was clear and obvious that Motion for Rehearing to that same Court would be pointless and a waste of your valuable time. I immediately began to prepare and research the Petition to the United States Supreme Court, and this motion and affidavit are required as part of our Petition for Certiorari Review in the high court.

Also, Rene, I would like to approach the agents and the prosecutors regarding a possible substantial assistance effort or proffer o your behalf to try and

get a sentence reduction at this stage. When the case is resolved in the courts of appeals, and even pending the Supreme Court Ruling, trial court can reclaim jurisdiction for the purpose of a sentence reduction, particularly, if under Rule 35(b) there is a motion by the government claiming substantial assistance. It seems to me that there would be no harm in this and it could very well be a tremendous help to you. I have found through my experience that, once the case is tried and a sentence is imposed, and once all of the matters are resolved in the government's eyes, they take a much more reasonable view of the next steps in the case. The fact that Joel got such a disproportionate low sentence, the fact that Marvin and the other Bahamians were never even arrested or charged, the fact that you were acquitted on the charges dealing with house etc. and the fact that the Judge imposed

such a high sentence may open the door to some mercy or compassion on the part of the government—but we need to do something from our end also. I ask you to consider this road especially since the content of the "jailhouse" tape recordings told the government everything possible already. In other words, anything that you said during a substantial assistance proffer to the agents or to the prosecutor at this point essentially be "old news" but, they often need you take the affirmative step to show that you are trying to cooperate or give substantial assistance before they will consider the Motion to Reduce Sentence. By this, I mean, that anything that you tell them they already know so, in your conscience and as a practical matter, you wouldn't be hurting Marvin or the other Bahamians, or even Joel by giving the government any other details or accounts of the proceeding—but it could very well

help you if I can sweet talk the government into this deal. Carefully consider this and call me as soon as you can regarding this issue and any questions that you may have on the affidavit and motion or on the Petition to the Supreme Court in general. Keep a positive thought and will keep trying.

Sincerely,

"s/"

Michael D. Gelety

Enclosures: As stated

MDG/bjh

TELEPHONE (954) 462-4600

TELEFAX (954) 462-0828

MICHAEL D. GELETY

ATTORNEY AT LAW

1209 S. E. THIRD AVE

FORT LAUDERDALE, FLORIDA 33316

EXHIBIT 2

Date: 11/19/07

Time: 12:08 PM Location: COA

Federal Bureau of Prisons

TRUFONE

Telephone Account Statement

Sensitive But Unclassified

Start Date: 11/1/2006 12:00 AM

End Date: 11/30/2006 11:59 PM

Location: COA

Call Status: All

Account Status: All

Call Type: All

Register #: 57160004

Include Zero Cost Transactions: Yes

EXHIBIT 2 [2]

Date:	11/1/2006
Time:	1:50:40 pm
Number called:	(954) 462-4600
Rec Ch:	81
Minutes:	0
Amount:	0.00
Balance:	0.00
CC:	11
Facility:	COA

Date:	11/2/2006
Time:	12:22:23 PM
Number called:	(954) 462-4600
Rec Ch:	83
Minutes:	11
Amount:	(2.99)
Balance:	34.03
CC:	0
Facility:	COA

EXHIBIT 2

Date:	11/7/2006
Time:	1:06:05 PM
Number called:	(954) 462-4600
Rec Ch:	81
Minutes:	0
Amount:	0.00
Balance:	0.00
CC:	11
Facility:	COA

Date:	11/7/2006
Time:	4:33:11 PM
Number called:	(954) 462-4600
Rec Ch:	83
Minutes:	0
Amount:	0.00
Balance:	0.00
CC:	11
Facility:	COA

EXHIBIT 2

Date:	11/7/2006
Time:	4:40:47 PM
Number called:	(954) 462-4600
Rec Ch:	83
Minutes:	4
Amount:	(0.92)
Balance:	26.21
CC:	0
Facility:	COA

Date:	11/8/2006
Time:	3:23:27 PM
Number called:	(954) 462-4600
Rec Ch:	81
Minutes:	0
Amount:	0.00
Balance:	0.00
CC:	11
Facility:	COA

EXHIBIT 2

Date:	11/8/2006
Time:	3:24:10 PM
Number called:	(954) 462-4600
Rec Ch:	81
Minutes:	3
Amount:	(0.69)
Balance:	25.52
CC:	0
Facility:	COA

Date:	11/9/2006
Time:	3:31:51 PM
Number called:	(954) 462-4600
Rec Ch:	81
Minutes:	0
Amount:	0.00
Balance:	0.00
CC:	11
Facility:	COA

EXHIBIT 2

Date:	11/9/2006
Time:	3:32:31 PM
Number called:	(954) 462-4600
Rec Ch:	81
Minutes:	0
Amount:	0.00
Balance:	0.00
CC:	11
Facility:	COA

Date:	11/9/2006
Time:	3:33:16 PM
Number called:	(954) 462-4600
Rec Ch:	81
Minutes:	0
Amount:	0.00
Balance:	0.00
CC:	11
Facility:	COA

EXHIBIT 2 [7]

Date:	11/9/2006
Time:	3:34:09 PM
Number called:	(954) 462-4600
Rec Ch:	81
Minutes:	0
Amount:	0.00
Balance:	0.00
CC:	11
Facility:	COA

Date:	11/9/2006
Time:	3:34:55 PM
Number called:	(954) 462-4600
Rec Ch:	81
Minutes:	3
Amount:	(0.69)
Balance:	24.83
CC:	0
Facility:	COA

EXHIBIT 2

Date:	11/9/2006
Time:	4:32:39 PM
Number called:	(954) 462-4600
Rec Ch:	83
Minutes:	0
Amount:	0.00
Balance:	0.00
CC:	11
Facility:	COA

Date:	11/13/2006
Time:	4:40:49 PM
Number called:	(954) 462-4600
Rec Ch:	81
Minutes:	0
Amount:	0.00
Balance:	0.00
CC:	10
Facility:	COA

EXHIBIT 2

Date:	11/14/2006
Time:	9:42:45 AM
Number called:	(954) 462-4600
Rec Ch:	81
Minutes:	0
Amount:	0.00
Balance:	0.00
CC:	11
Facility:	COA

Date:	11/14/2006
Time:	1:29:41 PM
Number called:	(954) 462-4600
Rec Ch:	81
Minutes:	2
Amount:	(0.46)
Balance:	14.94
CC:	0
Facility:	COA

EXHIBIT 2 [10]

EXHIBIT 3 – REPRODUCED FROM HAND WRITTEN COPY

No spelling or content changes.
Only sentence ending periods

Hey, Cream's It's Wedensday. I just got done seeing you. I thank you for that. I was trying say to you that I feel so bad for you, us, me, your kid's, my kid's, our kid's, your

parent's and your family and your Sister & friend's. I feel like I took you away from them. I feel so sad in my heart. I was just about crying in the window. I was trying to tell you I wish we could hold each other. If only my arm's could reach through the window to get you. But it helped to see you and stare at you. It helped my mind but not my heart. It hurt's to bad. I feel like I let a lot of people down. So I sit here thanking you for just staying in the window to let me see you. I wish we were in different shoes. Your kids need you. They were better off w/us. I

wish they would let us out for a day. I would take them all to Chucke-Cheese and have a blast. I would have all of us take a picture on the Chucke-Cheese ride. I miss cooking for the boy's. I'm crying rt now. I'm looking away from my cellmate, but I don't care I miss making you breakfast in bed. I loved to due it for you. You are my princess and you alway's will be! Well I'm not in good shape rt now so I'm going to stop writing. I'll write you again tomarrow + the next day + the next day etc. I love you

Love Always

Joel Perkins

X 0 X 0

that a sentence in the range of 70 months is a disruption in your life, but it is not a life-altering sentence —ten years, twelve years, fifteen years — is life altering. At 70 months, you can get out while you're still a young person, you can still enjoy your family, your children, your friends, and your life. You understood, you thanked me for my diligence (and even after talking to your Dad), you rejected this 70 month offer. **You recall that I tried to assure you that Joel <u>was</u> going to testify against you, and he will verify and corroborate everything in the meetings and the tapes. I did not (and I do not) want you to make this decision to go to trial thinking that Joel will "save" you at the last minute, that he'll refuse to testify, or that he will protect you or minimize your role. He <u>can't</u> — once he pleads guilty, he <u>must</u> follow through or <u>he</u> will get the 151, 188 or 200-plus months in prison — and he's not going to**

take that sentence for you. Additionally, I reminded you that even if he tried to help you, the Government will has overwhelming evidence against you with the recordings, your position on the boat, etc., and I'm sure that Joel understands that — he's not going to take the big sentence and watch you get convicted and get an equally big sentence. That would make no sense. As usual, I ended our meeting reminding you that we can go to trial and win acquittals on the conspiracy cases (or at least get the jury to designate lesser amounts of drugs) but, because we lose the three level reduction for acceptance of responsibility, and lose the two level reduction for the safety valve, you can easily end up with a higher sentence after taking a tremendous risk. You again thanked me and rejected the 70 months.

As I was leaving, I again reminded you that this very desirable plea offer was totally without

your cooperation with the Government – you don't need to do a debriefing, you don't need give any information on anyone, it is a straight plea, which makes it even a better deal. Despite our many conversations regarding the possibility of your cooperation with the Government in order to get the possible 5K1 reduction of sentence (or a Rule 35 reduction after the sentence), you have been absolutely adamant that you would not cooperate and would not testify – even after I fashioned a deal that would allow you to cooperate on minor matters without testifying against relatives, family members or anyone of importance to you. NOTE: Once the recorded conversations from jail were reviewed and your strong position against cooperation came through in your conversations with Jesse (and your strong feelings against my efforts to set forth this option for you), I have stopped my efforts to convince

you in this matter — but this option is always open to you.

Unfortunately, as you pondered and, frankly, as you delayed, the trial date got closer and the Government was forced to start to transcribe their several ..

... with the Defense Discovery Disclosure that we had discussed. **You will recall that we went over potential witnesses and evidence to try to explain certain portions of the testimony and certain parts of your activity and behavior during the course of this conspiracy. It seemed that you still did not believe that your husband would testify against you at the trial and you brought me a few of his letters to you (as I had requested) while also mentioning that you**

spoke to him before court and he was still reassuring you. Frankly, Leslie, it was not until Joel and his lawyer finally stood up before the Court he plead guilty that you finally started to believe what I was telling you. This reality seemed to hit home with the Government went through their detailed facts of the case — facts which Joel acknowledged and facts which Joel will testify about at your trial, against you. As I had predicted, the Government did not make any specific recommendations for Joel's sentence having him plead "open", without any limitations until such time as he cooperated by testifying against you. Then, at the time of his sentencing, the Government will ask the Court to reduce the sentence because of his cooperation under 5K1. I remind you again that, had the Government given him a specific number, 70 months, 60 months, 40 months, etc. then we would be able to use that

number against him during cross examination making it appear to the jury that he was testifying only to get that designated sentence. The way it is set up now, he can legitimately say that he plead open, without a specific number of months, and that technically he is facing anywhere from the bottom end of 87 months to life in prison as the Judge warned him.

You will recall that after Joel did his plea, I immediately jumped up and walked over and talked a long time to the Prosecutor and to the agent "Randy" trying to get them to come back down to the 70 month deal and that conversation went on long enough for the Judge to finally agree to take a 15 minute break and let us talk to them and to let you make a decision. Of course, when the Judge came back about a half an hour later, you were still thinking and we were still discussing the matter and

you simply could not make a decision. You will remember that the Judge addressed you regarding your concern and your comfort level having me as your attorney and you assured him that there were no problems, we had no differences and that you were confident and comfortable with my representation. However, the decision wasn't getting made and the Prosecutor finally made a last minute offer to us which you will recall that I wrote down and read into the record so there would be no misunderstanding (an so there would be no chance for the Prosecutor to back out later): we would plead guilty to one count of Conspiracy (with the Government dismissing the other Conspiracy count and the Possession count, the Government would agree to the safety valve, taking us out of the mandatory minimum sentence and giving us a two level reduction), the ...

Sincerely,

"s/"

Michael D. Gelety, Esq.

MDG/omp

I, Leslie Renae Perkins have read this letter, I have gone over it with my attorney, Michael D. Gelety, I have asked him questions, he has answered questions and explained the circumstance and it is my decision to:

Take a plea offer in this case to minimize my exposure.

_____

LESLIE RENAE PERKINS

Or
It is my decision to go to trial in this matter.

"s/"

_____

LESLIE RANAE PERKINS

Dated this _____ day of July, 2005.

Exhibit 4

BP-3408.058 ACKNOWLEDGMENT OF INMATE

PART 3 & 4 CDFRM

May 94

U.S. Department of Justice

Federal Bureau of Prisons

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3. Monitoring of Inmate Telephone Calls

The Bureau of Prisons reserves the authority to monitor (this includes recording) conversations on any telephone located within its institutions, said **monitoring to be done to preserve the security and orderly management of the institution and to protect the public.** An inmate's use of institutional telephones constitutes consent to this monitoring. A properly placed phone call to an attorney is not monitored. You must contact your unit team to request an unmonitored attorney call.

EXHIBIT 5

I have read ~~or had read to me~~ (cross out one) the above notification on the monitoring of inmate telephone calls. I understand that telephone calls I make from institution telephones may be monitored and recorded.

Signature of Inmate – Leslie Perkins "s/" Date 3/7/05

I hereby certify that the above information was (cross out incorrect statements) (provided to the inmate to read) and / or was (~~read and fully explained by me to the above inmate~~). The inmate (signed) / (~~refused~~) to sign.

Printed name / Signature of Staff Member

H. Crespo "s/" Date 03/07/05

4. Notification in Case of Death / Illness, Disposition of Property

In the event I should die, I direct that my mom, whose name is Helen Johnson and whose

address is 3830 NW 8 Place, Plantation, FL 33311, 954 – 345-0909 be notified. "s/" (initialed & dated

In the event the Bureau of Prisons staff is unable to locate the above designated person, following a reasonable search, I authorize the substitution of the following person in his or her stead.

Helen Johnson, 6010 NW 63rd Place, Parkland, FL 33067.

I authorize the Bureau of Prisons to transmit my property and personal effects including money remaining to my credit in, or due me from the Bureau of Prisons to my next of kin in accordance with state law.

I agree further that disposition may be made of my personal property located within the prison facility, including clothing, in accordance with the rules and regulations of the Bureau of Prisons.

EXHIBIT 5

In case of serious illness or other emergency the above named persons may be contacted to be notified of my condition. I also desire and authorize that the following be notified.

Signature of Inmate Leslie Perkins "s/" Date 3/7/05

I hereby certify that the above notification was (cross out incorrect statement) (provided to the inmate to read) and / or was (~~read and fully explained by me to the above inmate~~) before the inmate (voluntarily signed) / (~~refused to sign~~) this notification, this 07 day of Mar, 2005.

Printed Name / Signature of Staff Member

H. Crespo "s/" Date 03/07/05

Record Copy – Central File; Copy – Inmate

(This form may be replicated via WP)

This form replaces BP-408 (58) dated August 1991.

EXHIBIT 5